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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR J. GERBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the criminal anti-trafficking provision in Section 470ee(c) of the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm, requires the violation of a state or local archaeological resources protection law, or whether that section is triggered by the civil or criminal violation of any state or local law, ordinance, or permit "related to the protection of archaeological sites and objects," as held by the Seventh Circuit?

2. Whether the criminal anti-trafficking provision in Section 470ee(c) of the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm, applies to archaeological resources that were not removed from federal or Indian lands?

3. Whether the criminal anti-trafficking provision in Section 470ee(c) of the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm, is unconstitutionally vague because it fails to provide sufficient notice concerning the lands to which it applies and because it fails sufficiently to apprise citizens as to the violations of state or local law that trigger that section?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Arthur J. Gerber, and the Respondent, the United States of America.

The Respondent before this Court is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Arthur J. Gerber, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 20, 1993, and corrected on July 22, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 999 F.2d 1112 and is reproduced at App. 1, *infra*. The memorandum decision of the United States District Court for the Southern District of Indiana denying Petitioner's motion to dismiss the indictment is unpublished and is reproduced at App. 11, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 20, 1993, and corrected on July 22, 1993, affirming Petitioner's conviction dated July 14, 1992. The District Court had jurisdiction over this case pursuant to 18 U.S.C. § 3231 because the Indictment charged Petitioner with offenses against the laws of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case principally involves the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm, which is reproduced in its entirety at App. 31, *infra*.

STATEMENT OF THE CASE

More than fifteen hundred years ago, Native American Indians[1] built a series of large ceremonial and burial mounds in the American Midwest. These earthen mounds contained numerous ceremonial objects, which were often made of rare materials and exquisitely fashioned by their makers. This mound culture is affiliated with the "Hopewell phenomenon," and represents a period in human prehistory that exhibited the beginnings of settled agriculture, elaborate ceremonialism, and far-flung trading networks.

During the summer of 1987, the Indiana Department of Highways began construction of a new road in Posey County, Indiana near the GE Plastics Manufacturing Divi-

[1] Because the statute uses the term "Indian," we use that term in this Petition, although we realize that members of the American Indian community generally prefer the term "Native American."

sion, Mount Vernon Plant site. As part of the road construction process, and in compliance with Indiana state law, the earthmoving subcontractor obtained an archaeological survey to determine whether there were any archaeological sites in the area affected by the new road. The survey disclosed no archaeological sites, but required that the State of Indiana be notified immediately in the event that archaeological objects were discovered during the excavation of the new road. Neither the contractors nor GE fully complied with the terms of the archaeological survey.

The highway was designed to run through a ridge that contained a prominent knob. In order to stabilize the road bed, fill soil was needed, which the subcontractor obtained by razing the knob. In the process of bulldozing the knob, thousands of Indian artifacts were uncovered. It was later determined that the knob, which was almost entirely destroyed in the process of obtaining fill soil, was a significant Hopewell Indian ceremonial site from the Middle Woodland period and may have been the fifth largest mound of its type in eastern North America.

One of the bulldozer operators working on the knob was John William Way. Way happened to be a collector of Indian artifacts and, realizing the significance of the find, loaded the artifacts into his company's pickup truck without notifying the proper authorities of his discovery. Later, one of Way's acquaintances put him in contact with the Petitioner, Arthur Joseph Gerber, a professional photographer and well-known collector of Indian artifacts in southern Indiana. Some time thereafter, Way showed his artifacts to Gerber, who eventually bought the artifacts from Way for $6,000. In addition, on the evening that the sale was consummated, Way drove Gerber to the GE site,

where they encountered a great number of people collecting artifacts on what remained of the mound. At that time, GE's property was unfenced and was not posted with "No Trespassing" signs. Gerber subsequently returned to the site on several occasions, salvaging and stabilizing additional artifacts. Gerber sold a small portion of these artifacts at an Indian artifact show in Kentucky.

On July 11, 1991, Gerber was indicted for transporting the artifacts in interstate commerce. After the District Court denied Gerber's motion to dismiss the Indictment on legal grounds, Gerber entered a conditional guilty plea to five misdemeanor violations of Section 470ee(c) of the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm ("ARPA"), and was sentenced to twelve months in prison, reserving the right to appeal various legal issues concerning the applicability of ARPA to his conduct. As part of the plea bargain, Gerber acknowledged that by removing artifacts from GE's property he had committed violations of Indiana trespass and conversion law.

Gerber appealed his conviction to the Seventh Circuit. It was Gerber's contention that ARPA was inapplicable to his conduct because ARPA applies only to archaeological resources removed from public and Indian lands and that here the artifacts were removed from private property. It was also Gerber's contention that the violation of state or local law, which is a prerequisite for the application of Section 470ee(c), required the violation of a state or local archaeological resource law and that the Indictment should have been dismissed because it alleged violations of laws not specifically designed to protect archaeological resources.

The Seventh Circuit, in a decision written by Judge Posner, affirmed the decision of the District Court. *United*

States v. Gerber, 999 F.2d 1112 (7th Cir. 1993). While recognizing that Section 470ee(c) "does not jibe perfectly with the surrounding provisions," and "[t]hat the statute, the scholarly commentary, and the legislative history are all focused on federal and Indian lands," the Seventh Circuit concluded that subsection (c) applied to private lands. *Id.* at 1115. This was an issue of first impression because this is the first prosecution under ARPA of a person who trafficked in objects that were not removed from either federal or Indian lands. *Id.* at 1113. As to the other main issue, the Seventh Circuit failed to fully embrace Gerber's argument that Section 470ee(c) requires the violation of a state or local archaeological resource protection law, holding instead that the underlying violation of state law must be "*related* to the protection of archaeological sites and objects." *Id.* at 1116 (emphasis added). Applying this newly-announced standard, the Seventh Circuit concluded that Gerber's violations of trespass and conversion laws were sufficient to trigger Section 470ee(c). *Id.*

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT ISSUES MERITING REVIEW BY THIS COURT

The writ should be granted because the court of appeals' decision on these issues of first impression potentially affects every archaeologist, marine salvor, and metal detector enthusiast, particularly those who perform field work on private property and who previously thought they were immune from ARPA on that basis. The decision also threatens the vitality of collectors and dealers of antiquities, including bottles, Indian artifacts, Civil War relics, and other objects older than one-hundred years old,

who, as a result of the Seventh Circuit's decision, can no longer rest assured that they are acting lawfully when they acquire or sell antiquities removed from private property—even their own property. As a result of the Seventh Circuit's decision, all of these individuals also run the risk that they may be subject to ARPA's criminal provisions if their archaeological objects were "excavated, removed, sold, purchased, exchanged, transported, or received" in a purely technical violation of a civil statute, ordinance, or permit only remotely related to protecting archaeological resources. The case is thus of great theoretical, commercial, and archaeological importance.

This case also presents timely issues, as Congress and the American people have become increasingly sensitive to issues pertaining to Native American Indian objects and burial sites. Legislation protecting archaeological resources and sites, including burial sites, has increased recently at both the federal and state levels. For example, Congress recently enacted the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013, which intertwines closely with ARPA. In addition, all of the fifty states now have laws protecting their archaeological resources and sites. *Gerber*, 999 F.2d at 1117.

ARPA itself has seen dramatically increased use in recent years and is now a widely used law. Between 1985 and 1987 alone, there were 1,720 federally reported incidents of archaeological looting, resulting in 134 citations, 57 criminal misdemeanor ARPA convictions, 16 felony ARPA convictions, and 17 civil penalties under ARPA. *See* Carol Carnett, United States Department of the Interior, *Legal Background of Archaeological Resources Protection* (United States Dep't of Interior Technical Brief No. 11), at 8 (1991). After November 3, 1988, when Congress reduced the jurisdictional limit for ARPA felony

violations from $5,000 to $500, ARPA truly became a widely used law. *See* Sherry Hunt, *Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool*, 24 Ariz. St. L.J. 135, 141 (1992). Now that the Seventh Circuit has upset the prevailing view that ARPA does not extend to private and state lands, one would expect a vast increase in the number of ARPA civil and criminal cases as federal prosecutors nationwide take advantage of ARPA's expanded jurisdictional scope.

This case presents more than just fascinating and timely issues, however. The decision in this case has already been characterized as "significant" and "a landmark decision." William Grady, *Court Upholds Guilt in Artifacts Looting*, Chicago Tribune, July 22, 1993, at 10; Nancy Mitchell, *Artifact Collector's Conviction Upheld*, The Evansville Press, July 22, 1993, at 1. Lest there be any doubt that the Seventh Circuit's decision will set the course in this area of the law if it is allowed to stand, within just a few weeks after the publication of the decision, the Indiana Court of Appeals relied heavily on the Seventh Circuit's decision in holding that Indiana's resource protection law applied to items removed from private property, preventing the landowner in that case from removing artifacts from his *own land*. *Whitacre v. Indiana*, No. 15A05-9204-CV-128, 1993 WL 325656, at *3 (Ind. Ct. App. Aug. 30, 1993). Under the Seventh Circuit's ruling, by simply transporting those artifacts across state lines, the landowner in that case would have committed criminal violations of ARPA and could be forced to forfeit his archaeological objects to the federal government. *Gerber*, 999 F.2d at 1115; 16 U.S.C. § 470gg(b). This illustration also touches on the federalism issues that underlie this case.

So that the important issues of first impression raised in this case can be properly and promptly resolved, this Court should grant the writ.

II. THE SEVENTH CIRCUIT'S HOLDING THAT THE REQUISITE VIOLATION OF A STATE LAW NEED ONLY BE "RELATED" TO PROTECTING ARCHAEOLOGICAL RESOURCES IS INCORRECT AND LEAVES THE MEANING OF SECTION 470EE(C) IN A STATE OF CONFUSION

The Seventh Circuit clearly erred in rejecting Gerber's argument that Section 470ee(c) requires the violation of a state or local resource protection law.[2] Although subsection (c) refers to the violation of "*any* provision, rule regulation, ordinance, or permit in effect under State or local law," the Seventh Circuit correctly realized that a literal application of "any" would "carry the Act far beyond the objectives of its framers and create pitfalls for the unwary." 16 U.S.C. § 470ee(c) (emphasis added); *Gerber*, 999 F.2d at 1116. For example, under a literal interpretation of "any," a person who drove from Chicago to Milwaukee with *legally* obtained artifacts in his or her possession without automobile insurance would violate Section 470ee(c) because he or she "transport[ed] . . . in interstate . . . commerce, any archaeological resource . . . *transported* in violation of any provision, rule, regulation, ordinance, or permit in effect under state or local law." 16 U.S.C. § 470ee(c) (emphasis added). Consequently, the Seventh Circuit rejected a literal reading of "any." *Gerber*, 999

[2] Indiana had a law protecting archaeological objects and sites at the time of Gerber's actions, although Gerber's conduct fell outside of that statute. *Gerber*, 999 F.2d at 1117. All fifty states currently have laws protecting archaeological sites and objects. *Id.*

F.2d at 1116. In the process, however, the Seventh Circuit created a new, unworkable standard. Under that standard, "the Act is limited to cases in which the violation of state law is *related* to the protection of archaeological sites and objects." *Id.* (emphasis added).

Legislative history, which specifically addressed Section 470ee(c), indicates the standard is that the underlying state law offense must be the violation of an archaeological resource protection law. Specifically, Senator Domenici, the Senate sponsor of ARPA, stated that ARPA "would dovetail with existing state laws, such as New Mexico's, so that offenders could not skip to another state to avoid prosecution." 125 Cong. Rec. S10,834 (1979). Because New Mexico had an archaeological resource protection statute in effect at the time that ARPA was enacted, it is evident from Senator Dominici's statement that subsection (c) was intended to create an enforcement mechanism to assist states in enforcing their own archaeological resource protection laws. N.M. Stat. Ann. §§ 18-6-3 to 18-6-22 (1993). On the other hand, there is no indication that Congress intended to create a new class of federal crimes that would be triggered by violations of any state criminal or civil law, rule, regulation, or permit "related" to protecting archaeological resources.

The United States Department of Agriculture ("USDA") Forest Service, in Cultural Resources Report No. 32, states that "[s]ubsection (c) enlists Federal assistance in enforcing state and local *antiquities laws*. . . . This subsection is designed to prevent one from violating a state antiquities law and fleeing across a state line before local law enforcement agencies are able to respond." Robert B. Collins, *The Meaning Behind ARPA: How the Act is Meant to Work* at 5, *in* Cultural Resources Report No. 32 (USDA

Forest Service, Southwestern Region, July 1980) (emphasis added).

The Seventh Circuit fails to articulate any test—let alone a bright line test—for the types of laws that would trigger Section 470ee(c) by virtue of being "related" to protecting archaeological sites or objects. Aside from the fact that the Seventh Circuit's test is without support, the problem is in determining what laws are "related" to protecting archaeological resources. This lack of a workable test becomes particularly problematic because Section 470ee(c) encompasses criminal laws, civil laws, and even extends to ordinances and permits.[3] Thus, relatively minor infractions could easily be elevated into ARPA offenses. For example, simple violations of civil zoning laws and even acts of conversion, which involve a law "related" to protecting archaeological resources, according to the Seventh Circuit, pose some foreseeable problems. *Gerber*, 999 F.2d at 1116. For instance, if someone stole arrowheads from Gerber and sold them in another state, the thief could be prosecuted under ARPA for "sell[ing] . . . in interstate or foreign commerce, any archaeological resource . . . received in violation of any . . . State or local law." 16 U.S.C. § 470ee(c). A simple violation of state law is thus transformed into a federal offense with no connection to ARPA's stated purpose, thereby "carry[ing] the Act far beyond the objectives of the framers and creat[ing] pitfalls for the unwary." *Gerber*, 999 F.2d at 1116. This is regrettable since Gerber presented the Seventh Circuit

[3] There are a vast number of these types of laws, of which most citizens are ignorant, thereby creating pitfalls for the unwary. On the other hand, most amateur archaeologists are presumably aware of the laws, ordinances, and permit requirements pertaining specifically to the protection of archaeological resources.

with a clear, amply-supported alternative, as cognizable by the Act's legislative history.

Because Gerber is not alleged to have violated a state antiquities law, and because a violation of such a law should be required in light of ARPA's legislative history, the USDA's interpretation of that subsection, and the unworkability of the relatedness test, this Court should grant certiorari to eliminate the confusion that will arise when courts and law enforcement try to apply the Seventh Circuit's newly-imposed, nebulous standard.

III. THE SEVENTH CIRCUIT WRONGLY CONCLUDED THAT SECTION 470EE(C) APPLIES TO ARCHAEOLOGICAL RESOURCES REMOVED FROM NON-PUBLIC, NON-INDIAN LANDS

The Seventh Circuit also erred in applying ARPA to archaeological resources removed from non-public, non-Indian lands. Although Section 470ee(c) is silent as to its scope, there are numerous indications that the omission of a reference in Section 470ee(c) to federal or Indian lands was unintentional.

Both ARPA and its legislative history demonstrate that Congress' sole concern was protecting archaeological objects and sites on federal and Indian land. For instance, ARPA's section entitled "Congressional findings and declaration of purpose" states that "[t]he purpose of this chapter is to secure . . . the protection of archaeological resources which are on *public lands and Indian lands* . . . ." 16 U.S.C. § 470aa (emphasis added). Similarly, a chief sponsor of ARPA stated as follows:

> I want to emphasize in the boldest terms what the bill does not do:
>
> * * *

> *It does not affect any lands other than the public lands of the United States and lands held in trust by the United States for Indian tribes or individual Indian allottees.*

125 Cong. Rec. 17,393-94 (1979) (remarks of Congressman Udall) (emphasis added); *accord* 125 Cong. Rec. S10,832 (1979) (remarks of Sen. Bumper) ("The purpose of S. 490 is to provide greater protection than currently exists for archaeological resources located on public and Indian lands").

Both the House and Senate reports analyzing ARPA are replete with signs that Congress did not intend ARPA to extend to archaeological resources removed from lands other than public and Indian lands. The House Report states the purpose of H.R. 1825 as "provid[ing] protection for archaeological resources found on public lands and Indian lands of the United States" and only speaks in terms of public and Indian lands in addressing the problem sought to be resolved by ARPA. H.R. Rep. No. 96-311, 96th Cong., 1st Sess. 7 (1979); *accord* S. Rep. No. 96-179, 96th Cong., 1st Sess. 6 (1979) (purpose is to "provide greater protection than now exists for archaeological resources on public lands and Indian lands of the United States"). In terms of costs associated with the legislation, the House Report states that "[t]he lands involved are entirely Federally owned or Indian lands . . . ." H.R. Rep. No. 96-311, 96th Cong., 1st Sess. 7, 13 (1979).

Along these lines, ARPA superseded the Antiquities Act of 1906, 16 U.S.C. §§ 431-433, which was limited to federal lands, specifically, lands "owned or controlled by the United States." 16 U.S.C. § 432; *Gerber*, 999 F.2d at 1115.

Furthermore, extending Section 470ee(c) to non-public, non-Indian lands creates internal problems within ARPA

that Congress could not have intended. Thus, as the Seventh Circuit noted:

> if the Act applies to nonfederal, non-Indian lands, its provisions are at once overinclusive and underinclusive: overinclusive because the Act authorizes the federal court in which a defendant is prosecuted to order, in its discretion, the forfeiture of the archaeological objects involved in the violation *to the United States* (unless they were removed from Indian lands),[4] §§ 470gg(b), (c); underinclusive because the provisions authorizing civil penalties and the payment of rewards to informers . . . are administered by officials who lack jurisdiction over nonfederal, non-Indian lands. §§ 470bb(2), 470ff, 470gg(a).

Gerber, 999 F.2d at 1115.

Significantly, prior to Gerber's indictment, it was the official position of the USDA Forest Service and the United States Department of the Interior—the department with the closest connection to ARPA—that ARPA did not extend to private property. *Cultural Resources Law Enforcement An Emerging Science* (USDA Forest Service, Southwestern Region), at 1, 101 (1980) ("A conviction under the Archaeological Resource Protection Act requires proof of the following elements: . . . . That said resource was located on public lands"); Carol Carnett, United States Department of the Interior, *Legal Background of Archaeological Resources Protection* (United States Dep't of Interior Technical Brief No. 11), at 10 (1991) (ARPA criminal convictions "require . . . that said resource was

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[4] The custody and disposition of the artifacts were, and to some extent still are, disputed issues in this case. While it appears that the items could be given to GE, a dispute lingers as to whether GE should be allowed to dispose of the artifacts as it sees fit or whether it should reinter the artifacts.

located on public and Indian lands").[5] Thus, starting in 1980, the very departments with responsibility over ARPA have advised prosecutors and citizens alike that ARPA requires that the archaeological resource was removed from federal lands.

It is also instructive that the vast majority of scholarly commentators state or assume that ARPA is limited to archaeological resources on public and Indian lands. *Gerber*, 999 F.2d at 1115 (citing Kristine Olson Rogers, *Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals*, 2 Journal Envtl. L. & Litig. 47, 72 (1987)).[6]

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[5] Interestingly, during the course of this litigation, the technical brief was revised to eliminate the public or Indian lands requirement. Carol Carnett, *Legal Background of Archeological Resources Protection* (U.S. Dep't of Interior Technical Brief No. 11) (Revised Sept. 1991), at 10.

[6] The conclusions in these commentaries are particularly persuasive because they often come from advocates of increased protection for archaeological resources. For example, one leading article, in addressing the lands affected by ARPA, states that "ARPA protects archaeological resources on public lands and Indian lands," and "[a]s a result, federal jurisdiction under ARPA is no greater than under the Antiquities Act," which was limited to federal lands. Lorrie D. Northey, *The Archaeological Resources Protection Act of 1979: Protecting Prehistory for the Future*, 6 Harv. Envtl. L. Rev. 61, 74-75 (1982); *see also* Leslie S. Potter and Bruce Zagaris, *Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Initiative in the Recovery and Return of Stolen Cultural Property*, 5 Transnat'l Law., 627, 666 (1992) ("ARPA does not apply to objects discovered on private property"); Margaret B. Bowman, *The Rebuttal of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 Harvard Envtl. L. Rev. 147, 186 (1989) ("ARPA . . . does not apply to private or state land, even of the project is federally funded"); Linda M. Jones, *Preserving Utah's Cultural Resources: A Proposal for New Legislation*, 10 J. Energy L. & Pol'y 93, 105 (1989) ("ARPA does not address whether a person may be suc-

(Footnote continued on following page)

There is substantial doubt as to whether subsection (c) applies to private land. This doubt should have should have caused the Seventh Circuit to take into account several principles firmly adhered to by this Court. Absent unmistakably clear language in a statute, principles of federalism require that the statute be construed narrowly so as to avoid interfering with state sovereign powers. *See, e.g, Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991); *Evans v. United States*, 112 S. Ct. 1881, 1901 (1992)

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[6] *continued*

cessfully charged . . . if he excavated on public property under the mistaken belief that the property was privately owned"); Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 Yale L. J. 466, 481 (1988) ("ARPA does not apply to artifacts found on private property"); Jim Robbins, *Violating History*, 61 Nat'l Parks 26, 28, 30 (July-Aug. 1987) (ARPA "was specifically written to cover the looting of artifacts from federal property" and "the government must prove that the artifact was taken from federal property"); John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 Am. J. Int'l L. 831, 851 (1986) (ARPA "applies only to objects illegally taken from 'public lands and Indian lands'—i.e., to lands under federal ownership or protective jurisdiction"); Derek V. Goodwin, *Raiders of the Sacred Sites*, The New York Times Magazine 65, 86 (Dec. 7, 1986) ("many law enforcement officers say [ARPA] is nearly impossible to enforce because it puts the burden on the Government to prove materials have been taken from Federal lands"); Scott S. Warren, *Crackdown on Shard Thieves*, 58 Nat'l Parks 12, 16 (Sept.-Oct. 1984) ("One of the ironic side effects of ARPA is that strict enforcement of the law on public lands has shifted pot-hunting to private lands . . . where ARPA does not apply"); Lawrence Rosen, *The Excavation of American Indian Burial Sites: A Problem in Law and Professional Responsibility*, 82 Am. Anthropologist 5, 12 (March 1980) (ARPA "does not, however, cover archaeological resources found outside of areas over which the federal government exercises some control"); Paul R. Fish, *Federal Policy and Legislation for Archaeological Conservation*, 22 Ariz. L. Rev. 681, 695-96 (1980) (federal protection of resources privately owned is "strictly limited to peripheral actions, such as the withholding of federal funds or licenses to projects that might contribute to destruction").

(Thomas J., dissenting). This concern of infringing on state sovereign powers is especially significant here because states traditionally exercise police powers over non-federal lands within their borders, all fifty states have enacted archaeological resource protection laws, and Indiana had legislation concerning protection of archaeological resources at the time of the events alleged in the Indictment. *Gerber*, 999 F.2d at 1117.

In addition, where doubt exists as to the meaning of a penal statute the rule of lenity requires that all doubts be resolved in favor of lenity. *See, e.g., Crandon v. United States*, 494 U.S. 152, 158 (1990).

Finally, the lack of clarity in ARPA, especially in light of the statements in the legislative history and the consensus of the commentators that ARPA is inapplicable to non-public, non-Indian lands, indicates that there are serious constitutional problems stemming from ARPA itself and its application in this case. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (vagueness concerning the conduct forbidden by a statute is constitutionally impermissible). These vagueness concerns are particularly profound here because even the United States Government espoused the view that ARPA did not apply to private lands, *see, supra*, at 13-14, and the vagueness doctrine is predominately concerned with the potential for arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). The Government's published comments show that this is not a case where one has to speculate whether ARPA will be arbitrarily enforced, rather, this is a case where there is overwhelming evidence that law enforcement has and will apply ARPA in an arbitrary manner.

When all of these factors are considered, there is strong evidence that the Seventh Circuit's decision that ARPA applies to private lands is fundamentally flawed. The

Seventh Circuit's ruling on this issue of first impression is of tremendous importance, particularly when it is combined with the court's holding that any criminal or civil law "related" to protecting archaeological resources and objects triggers subsection (c). This clearly opens the door to the possibility that someone could be convicted of an ARPA violation for removing archaeological resources from their own property, as evidenced by the *Whitacre* decision. *See, supra*, at 7. Given the obvious impact of the Seventh Circuit's decision to extend ARPA to private lands, and the potential chilling effect of that erroneous ruling, this Court should grant certiorari so that this important issue of first impression can be promptly resolved.

CONCLUSION

The Seventh Circuit's decision on these issues of first impression has been heralded as "significant" and a "landmark decision."[7] The decision will (as it already has)[8] set the course in federal and state archaeological resource protection laws and strategies for many years. That will be unfortunate since the decision is wrong on a number of critical points.

The importance of clarifying ARPA's jurisdictional scope and its meaning is manifest. We respectfully urge this Court to take the case in order to clarify these issues and

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[7] William Grady, *Court Upholds Guilt in Artifacts Looting*, Chicago Tribune, July 22, 1993, at 10; Nancy Mitchell, *Artifact Collector's Conviction Upheld*, The Evansville press, July 22, 1993, at 1.

[8] *See Whitacre v. Indiana*, No. 15A05-9204-CV-128, 1993 WL 325656, at *3 (Ind. Ct. App. Aug. 30, 1993) (relying on the Seventh Circuit's *Gerber* decision to interpret Indiana's resource protection law).

to set forth definitively the duties and correlative rights of citizens nationwide, such as Mr. Gerber, who are attempting to pursue their hobby of metal detecting, and collecting artifacts, Civil War relics, antiquities, and the like, but who never imagined or would have been able to predict that ARPA would be applied as it was in this case.

Respectfully submitted,

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October 18, 1993

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-2741

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARTHUR J. GERBER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division.
No. 91 CR 19—**Gene E. Brooks,** *Chief Judge.*

ARGUED JUNE 3, 1993—DECIDED JULY 20, 1993

Before POSNER, RIPPLE, and ROVNER, *Circuit Judges.*

POSNER, *Circuit Judge.* Arthur Joseph Gerber pleaded guilty to misdemeanor violations of the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa *et seq.*, and was sentenced to twelve months in prison, reserving however his right to appeal on the ground that the Act is inapplicable to his offense. What he had done was to transport in interstate commerce Indian artifacts* that he had stolen from a burial mound on privately owned land

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* We are mindful that "Native American" is the term preferred by most members of the American Indian community. Since, however, the statute and both of the parties use the term "Indian," we have decided to do likewise.

in violation of Indiana's criminal laws of trespass and conversion. The section of the Archaeological Resources Protection Act under which he was convicted provides that "no person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law." 16 U.S.C. § 470ee(c). Gerber argues that despite the references in this section to state and local law, the Act is inapplicable to archaeological objects removed from lands not owned either by the federal government or by Indian tribes. His back-up argument is that the provisions, rules, regulations, and so forth of state or local law to which the Act refers are limited to provisions expressly protecting archaeological objects or sites, as distinct from laws of general application such as those forbidding trespass and theft. The issues are novel because this is the first prosecution under the Act of someone who trafficked in archaeological objects removed from lands other than either federal or Indian lands.

More than fifteen hundred years ago in the American midwest Indians built a series of large earthen mounds over prepared mound floors containing human remains plus numerous ceremonial artifacts and grave goods made of silver, copper, wood, cloth, leather, obsidian, flint, mica, quartz, pearl, shells, and drilled, carved, or inlaid human and bear teeth. This mound culture, the product of a civilization that included the beginnings of settled agriculture, an elaborate ceremonialism, and far-flung trading networks, has been dubbed the "Hopewell phenomenon." N'omi B. Greber & Katharine C. Ruhl, *The Hopewell Site: A Contemporary Analysis Based on the Work of Charles C. Willoughby* (1989); Warren K. Moorehead, *The Hopewell Mound Group of Ohio* (Field Museum of Natural History, Publication No. 211, 1922). In 1985 farmers sold General Electric a piece of untillable land in southwestern Indiana adjacent to one of its factories. The land contained a prominent

knob on top of a ridge. Unbeknownst to anyone this knob was a Hopewell burial mound some 400 feet long, 175 feet wide, and 20 feet high. The mound and its contents (which included two human skeletons) were intact—even the perishable materials such as wood and leather artifacts were well preserved—and when discovered it would prove to be one of the five largest Hopewell burial mounds known.

A highway was planned to run through the ridge on which the knob was located. In the course of construction, in 1988, earth was removed from the knob to stabilize the roadbed. Workmen engaged in this removal discovered in the knob curious objects—turtleback-shaped rocks—which they showed to a heavy-equipment operator on the project, named Bill Way, who happened to be a collector of Indian artifacts. Recognizing the significance of the find, Way nosed his bulldozer into the knob and quickly discovered hundreds of artifacts, including copper axeheads, inlaid bear canines, and tooled leather. He loaded these items into his pickup track and covered up the excavation he had made. An acquaintance put him in touch with Arthur Joseph Gerber, a well-known collector of Indian artifacts and promoter of annual Indian "relic shows." Gerber paid Way $6,000 for the artifacts and for revealing to Gerber the location of the mound. Way took Gerber to the site the same night, encountering other people digging for Indian artifacts. Gerber returned to the site several more times, excavating and removing hundreds of additional artifacts including silver earspools, copper axeheads, pieces of worked leather, and rare silver musical instruments, some with the original reeds preserved. On Gerber's last visit to the site he was detected by a General Electric security guard and ejected. Shortly afterward Gerber sold some of the artifacts at his annual "Indian Relic Show of Shows" in Kentucky. He acknowledges that in entering upon General Electric's land without the company's permission and in removing, again without its permission, Indian artifacts buried there, he committed criminal trespass and conversion in violation of Indiana law. He also acknowledges having transported some of the stolen artifacts in interstate commerce.

The preamble of the Archaeological Resources Protection Act of 1979 states that "archaeological resources on public lands [defined elsewhere in the Act as *federal* public lands] and Indian lands are an accessible and irreplaceable part of the Nation's heritage" and that the purpose of the Act is "to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands." 16 U.S.C. §§ 470aa(a)(1), (b). Consistent with this preamble, most of the Act is given over to the regulation, in the form of civil and criminal penalties, permit requirements, forfeiture provisions, and other regulatory devices, of archaeological activities *on federal and Indian lands*. The criminal penalties are for archaeological activities conducted on those lands without a permit and for trafficking in archaeological objects that have been removed from them in violation either of the Act's permit requirements or of any other federal law. §§ 470ee(a), (b). Gerber did not remove Indian artifacts from federal or Indian lands, however, and was therefore prosecuted under the third criminal provision (§ 470ee(c), quoted earlier), which is not in terms limited to such lands.

The omission of any reference in subsection (c) to federal and Indian lands was, Gerber argues, inadvertent. Not only the preamble of the Act, but its legislative history, shows that all that Congress was concerned with was protecting archaeological sites and objects on federal and Indian lands. This is indeed all that the preamble mentions; and a principal sponsor of the Act said that "it does not affect any lands other than the public lands of the United States and [Indian] lands." 125 Cong. Rec. 17,394 (1979) (remarks of Congressman Udall). The legislative history contains no reference to archaeological sites or objects on state or private lands. The Act superseded the Antiquities Act of 1906, 16 U.S.C. §§ 431-33, which had been expressly limited to federal lands. And if the Act applies to non-federal, non-Indian lands, its provisions are at once overinclusive and underinclusive: overinclusive because the Act authorizes the federal court in which a defendant is pros-

ecuted to order, in its discretion, the forfeiture of the archaeological objects involved in the violation *to the United States* (unless they were removed from Indian lands), §§ 470gg(b), (c); underinclusive because the provisions authorizing civil penalties and the payment of rewards to informers out of fines collected in criminal prosecutions under the Act are administered by officials who lack jurisdiction over nonfederal, non-Indian lands. §§ 470bb(2), 470ff, 470gg(a). (The artifacts stolen by Gerber were recovered and are being held by the United States as evidence in this case, but they have not been ordered forfeited.) Most scholarly commentators on the Act assume that it is limited to federal and Indian lands. E.g., Kristine Olson Rogers, "Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals," 2 *J. Environmental Law & Litigation* 47, 72 (1987). Gerber reminds us of the rule of lenity in interpreting criminal statutes and of the implied constitutional prohibition against excessively vague criminal statutes. He adds that subsection (c) of section 470ee would not be a nullity if the Act were held to be limited to sites and objects on federal and Indian lands. A number of state laws prohibit trafficking in stolen Indian artifacts regardless of their origin, and it has not been suggested that these statutes are preempted by the federal Act even with respect to artifacts stolen from federal or Indian lands. A person who trafficked in Indian artifacts in violation of state law would be subject to federal prosecution only under subsection (c) even if the artifacts had been removed from federal or Indian lands, if the removal happened not to violate federal law.

We are not persuaded by these arguments. That the statute, the scholarly commentary, and the legislative history are all focused on federal and Indian lands may simply reflect the fact that the vast majority of Indian sites—and virtually all archaeological sites in the Western Hemisphere are Indian—are located either in Indian reservations or on the vast federal public lands of the West. Subsection (c) appears to be a catch-all provision designed to back up state and local laws protecting archaeological sites and objects wherever located. It resembles the Mann

Act, the Lindbergh Law, the Hobbs Act, and a host of other federal statutes that affix federal criminal penalties to state crimes that, when committed in interstate commerce, are difficult for individual states to punish or prevent because coordinating the law enforcement efforts of different states is difficult. The reference to interstate commerce would be superfluous if the subsection were limited to artifacts taken from federal or Indian lands, since that source would establish federal jurisdiction with no need to require proof that the artifacts were transported in interstate commerce. Probably the subsection was added as an afterthought, so one is not surprised that it does not jibe perfectly with the surrounding provisions; but that does not make it invalid, and it certainly is not vague. And we cannot see how the purposes of the Act would be undermined by our giving subsection (c) the interpretation that its words invite.

An amicus brief filed by several associations of amateur archaeologists claims that such an interpretation will infringe their liberty to seek to enlarge archaeological knowledge by excavating private lands. But there is no right to go upon another person's land, without his permission, to look for valuable objects buried in the land and take them if you find them. At common law General Electric would have been the owner of the mound and its contents regardless of the fact that it was unaware of them. *Elwes v. Brigg Gas Co.*, 33 Ch. D. 562 (1886); *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44. The modern American law is the same, *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985); *Ritz v. Selma United Methodist Church*, 467 N.W.2d 266, 269 (Ia. 1991); *Favorite v. Miller*, 407 A.2d 974, 978 (Conn. 1978); *Bishop v. Ellsworth*, 234 N.E.2d 49 (Ill. App. 1968); *Allred v. Biegel*, 219 S.W.2d 665 (Mo. App. 1949); *Chance v. Certain Artifacts Found & Salvaged*, 606 F. Supp. 801, 806-08 (S.D. Ga. 1984). *Allred* actually involved an Indian artifact. Although we have found no Indiana cases, we are given no reason to suppose that the Indiana courts would adopt a different rule. It would

make no difference if they would. Whatever the rightful ownership of the mound and its contents under current American law, no one suggests that Way or Gerber obtained any rights to the artifacts in question. No doubt, theft is at the root of many titles; and priceless archaeological artifacts obtained in violation of local law are to be found in reputable museums all over the world. But it is almost inconceivable that Congress would have wanted to encourage amateur archaeologists to violate state laws in order to amass valuable collections of Indian artifacts, especially as many of these amateurs do not appreciate the importance to scholarship of leaving an archaeological site intact and undisturbed until the location of each object in it has been carefully mapped to enable inferences concerning the design, layout, size, and age of the site, and the practices and culture of the inhabitants, to be drawn. It is also unlikely that a Congress sufficiently interested in archaeology to impose substantial criminal penalties for the violation of archaeological regulations (the maximum criminal penalty under the Act is five years in prison plus a $100,000 fine, § 470ee(d)) would be so parochial as to confine its interests to archaeological sites and artifacts on federal and Indian lands merely because that is where most of them are.

We conclude that section 470ee(c) is not limited to objects removed from federal and Indian lands, but we must consider Gerber's alternative argument, that the section is limited to removals in violation of state and local laws explicitly concerned with the protection of *archaeological* sites or objects. Gerber argues that if it is not so limited all sorts of anomalies are created. Suppose he had bought an Indian artifact from its rightful owner but had failed to pay the applicable state sales tax, and had transported the artifact across states lines. Then he would, he tells us, be transporting in interstate commerce an archaeological object purchased in violation of state law. And likewise if he transported such an object in interstate commerce in a vehicle that exceeded the weight limitations imposed by state law.

These are poor examples. It is unlikely in either case that the state would consider the *transportation* of a good to be in violation of state law merely because sales tax had not been paid or an overweight vehicle had been used. But we agree with the general point, that the Act is limited to cases in which the violation of state law is related to the protection of archaeological sites or objects. A broader interpretation would carry the Act far beyond the objectives of its framers and create pitfalls for the unwary. But we do not think that to be deemed related to the protection of archaeological resources a state or local law must be *limited* to that protection. A law that forbade the theft of Indian artifacts "and any other object having historical or artistic value" could not reasonably be thought a law unrelated to the protection of such artifacts merely because it had broader objectives. That is essentially what Indiana's laws forbidding trespass and conversion have: objectives that include but are not exhausted in the protection of Indian artifacts and other antiquities. A law that comprehensively protects the owner of land from unauthorized incursions, spoliations, and theft could well be thought to give all the protection to buried antiquities that they need, making the passage of a law specially protecting buried antiquities redundant—and the passage of new laws is never costless and rarely easy. The interpretation urged by Gerber would if accepted compel states desiring federal assistance in protecting Indian artifacts in nonfederal, non-Indian lands within their borders to pass laws that might duplicate protections already adequate conferred on landowners sitting atop undiscovered archaeological sites by existing laws of general applicability. Granted, all fifty states have laws expressly protecting their archaeological sites; and in 1989, too late for this case, Indiana amended its law to forbid—redundantly—what Gerber had done. So the interpretation for which he contends might not actually impose a significant burden on the states. But Indiana may not have amended its law earlier because it thought its general criminal laws of trespass and conversion adequate—for all we know, it amended

the law in response to Gerber's contention that the federal Act contains a loophole through which he and others like him might be able to squeeze.

We conclude that Gerber's conduct was forbidden by the Act. We commend counsel, Harvey Silets for the defendant and Larry Mackey for the government, for the exceptional quality of their briefs and argument. We have not hesitated to criticize counsel who fall below minimum professional standards for lawyers practicing in this court; equally, counsel whose performance exceeds those standards by a generous margin deserve our public recognition and thanks.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Corrected Date: July 22, 1993
Date: July 20, 1993

BEFORE:

Honorable RICHARD A. POSNER, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 92-2741

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ARTHUR J. GERBER,

Defendant-Appellant

Appeal From the United States District Court
for the Southern District of Indiana, Evansville Division
No. 91 CR 19, Gene E. Brooks, Chief Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on July 20, 1993.

[Dated January 28, 1992]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	CAUSE NO.
	)	EV 91-19-CR
ARTHUR JOSEPH GERBER,	)	
	)	
Defendant.	)	

ORDER

This matter having come before the court on Gerber's Motion to Dismiss and eighteen other pre-trial motions, and this Court being duly advised and of the opinion that the Motion to Dismiss should be denied and the pre-trial motions should be granted in part and denied in part, it is

ORDERED that the Defendant's Motion to Dismiss is DENIED;

IT IS FURTHER ORDERED that the Motion for Disclosure of Bad Acts or Convictions of the Defendant, Motion for Bill of Particulars, Motion for *In Camera* Inspection of Co-Defendants' Statements, Defendant's Discovery Motion, Defendant's Motion for Production of Grand Jury Minutes and Information, Motion for Disclosure of Grand Jury Procedures, Motion for Disclosure of Means of Identification, Motion for Information Regarding Government's Use of Informants, Motion for Disclosure and Production of Evidence that is Favorable to the Accused, Defendant's Motion for Discovery of Statements of Co-Defendant's and Alleged Co-Conspirators, Motion to Inverview Co-Conspirator government Witnesses, Motion for Notice of In-

tention to Use Evidence, Motion to Interview Government Witnesses, Motion for Exculpatory Evidence, and the Motion to Disclose the Identities of Informants and Sources are DENIED;

IT IS FURTHER ORDERED that the Motion for Preservation of Tapes and Notes is GRANTED to the extent that it concerns the preservation of various evidence, documents and other material related to this case which is in the custody or control of the United States, but to the extent that it relates to the disclosure of information concerning witnesses which will be unavailable it is DENIED;

IT IS FURTHER ORDERED that the Motion for Leave to File Additional Motions is GRANTED and Gerber is granted leave to file supplementary motions and memoranda relating to information provided by the United States within ten days after receipt of such material;

IT IS FURTHER ORDERED that Defendant's Motion for Pre-Trial Determination of the Admissibility of Co-Conspirators' Statements is GRANTED and the United States is ordered to submit its proffer at its earliest convenience.

Done this 28th day of January 1992 in Evansville, Indiana.

/s/ GENE E. BROOKS
GENE E. BROOKS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

Distribution to Counsel of Record

MEMORANDUM

This matter comes before the Court on Arthur Joseph Gerber's Motion to Dismiss and eighteen other pre-trial motions. A seven count indictment was filed against Gerber on 11 July 1991 charging him with conspiracy to violate and violation of the Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa *et seq.*

MOTION TO DISMISS

Gerber presents seven grounds for dismissal.

Inadequacy of the underlying state or local violations.

Gerber argues all the indictments should be dismissed because they fail to allege any offense cognizable under ARPA. Gerber argues 16 U.S.C. § 470ee(c) should be interpreted to require a violation of a state or local resource protection law and that violation of Indiana criminal trespass and conversion laws are inadequate to satisfy the requirements of ARPA. 16 U.S.C. § 470ee(c) states:

> (c) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

Though Gerber devotes many pages of his brief discussing the legislative history of ARPA, it is unnecessary to examine the legislative history since the statute is unambiguous. *Burlington N.R.R. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987) ("Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.' "). Gerber

argues the statute is ambiguous because § 470kk(c) states, "[n]othing in this Act shall be construed . . . to affect the lawful recovery, collection, or sale of archaeological resources from land other than public land or Indian land." Gerber points out that the indictment does not allege public or Indian land was involved, but fails to note that the indictment does allege that his collection was unlawful. The exemption of § 470kk(c) only speaks to lawful collection on non-public, non-Indian land, not unlawful recovery, collection, or sale. Section 470kk(c) does not create an ambiguity in the statute.

Gerber further argues "this legislation could hardly be considered groundbreaking if it were simply meant to again punish stolen property put into the stream of interstate commerce." Gerber Brief in Support of Motion to Dismiss at 11. It is of no relevance whether or not this statute is groundbreaking. Congress enacted this legislation which in part defines a criminal activity and proscribes its punishment. The statute's alleged failure to be groundbreaking does not create an ambiguity. Gerber's argument here ignores the statute's focus on archaeological resources. Even if the statute "simply meant to again punish stolen property put into the stream of interstate commerce," it still defines a unique, unambiguous crime based on the nature of the stolen property being an archaeological resource.

ARPA, 16 U.S.C. § 470ee(c), does not require, as Gerber argues, the violation of a state or local resource protection law; rather, it states a "violation of *any* provision, rule, regulation, ordinance, or permit in effect under State or local law." (Emphasis added). There is no ambiguity in the wording of the statute and therefore no exploration of the legislative history is warranted. Violation of the Indiana criminal trespass and conversion laws are ade-

quate to satisfy the requirements of § 470ee(c) specifying a "violation of any . . . State or local law."

Having decided that the Indiana criminal trespass and conversion laws satisfy the statute, it is unnecessary to address Gerber's arguments concerning Indiana's resource protection laws.

Void for vagueness.

Gerber next argues all the indictments should be dismissed because ARPA is unconstitutionally vague. "It is Gerber's assertion that 470ee(c) fails to give notice of the proscription of any definite act or acts, and is susceptible to more than one construction . . ." Gerber Brief in Support of Motion to Dismiss at 18. Gerber cites to *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) and its description of the vagueness doctrine as "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender* goes on to state "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " In this case, the statute's proscription against interstate transactions involving archaeological resources procured "in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law" makes clear what conduct is prohibited and Gerber has not made any showing how the statute is unconstitutionally vague such that policemen, prosecutors, or juries could pursue their personal predilections. Gerber's desire for Congress to have specifically mentioned criminal statutes or property protection laws would have contributed no more to the meaning of the statute than does the word "any" to modify the words "provision, rule, regulation, ordinance, or permit in effect."

Gerber's argument that the phrase "any provision, rule regulation ordinance, or permit" is borrowed from § 470ee(b) is equally meritless. To the extent that the phrase is borrowed, the word "any" in § 470ee(b) appears to also include criminal statutes and property protection laws. Therefore there is no conflict between the two uses of the phrase. Nevertheless, § 470ee(c) is not vague.

The rule of lenity.

Gerber argues the ambiguities in the statute require the application of the rule of lenity. Since this Court has already determined the statute is not vague, it is unnecessary to address the applicability of the rule of lenity.

The applicability of ARPA to non-public, non-Indian lands.

Gerber argues ARPA is not applicable to non-public, non-Indian lands. Gerber does not present any argument on this point beyond its mere assertion for the purposes of preserving the issue, therefore this Court will not address it other than to reaffirm its position as stated in the order of 25 October 1991 in *United States v. May*, EV 91-32-CR.

The lack of a requirement of knowledge.

Gerber argues "that without requiring knowledge that the contested artifacts were excavated or removed in violation of ARPA the application of the statute is unconstitutionally vague and violative of due process of the law." Gerber Brief in Support of Motion to Dismiss at 21 (parenthetical omitted). Gerber does not present any argument on this point beyond its mere assertion for the purposes of preserving the issue, therefore this Court will not address it other than to reaffirm its position as stated in

the order of 25 October 1991 in *United States v. May*, EV 91-32-CR.

Equal Protection

Gerber argues that ARPA creates an arbitrary classification of those who illegally procure an archaeological resource from public or Indian land and those who illegally procure such resource from other land by providing for civil penalties for the former but not the latter. Providing for potentially additional civil penalties by the Federal land manager concerned is not an arbitrary classification. There is a rational basis for providing Federal land managers the power to impose an alternate or additional punishment for violations occurring within their area of control. Such control strengthens the authority of Federal land managers in their authority over their territory and over the permits they issue. Gerber was not denied equal protection by not having a Federal land manager with authority over the land from which the indictment charges he procured archaeological resources.

Statute of limitation for the underlying state law offense.

Gerber argues the expiration of Indiana's two year statute of limitation for the underlying state law offenses charged in the indictment bars their use by the prosecution. Gerber's argument is not well founded. Where a criminal defendant is charged with violation of a federal statute and the violation of a state offense is an element of that federal offense, the only applicable statute of limitation is federal, not state. *United States v. Thomas*, 887 F.2d 1341 (9th Cir. 1989). Indiana's statute of limitation for the underlying offense is not relevant to this prosecution.

The Motion to Dismiss is DENIED.

MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS

Gerber requests leave to file supplementary motions within ten days of his receipt of discovery material provided by the United States. There being no objection by the United States, the motion is GRANTED.

MOTION FOR DISCLOSURE OF BAD ACTS OR CONVICTIONS OF THE DEFENDANT

In reliance on the good faith of the United States in its brief in response to this motion by Gerber, this motion is moot since all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. The motion is DENIED.

MOTION FOR BILL OF PARTICULARS

Gerber moves this Court to order a bill of particulars be filed by the United States. A bill of particulars is not warranted when "the indictment . . . sufficiently apprises the defendant of the charges to enable him to prepare for trial." *United States v. Serola*, 767 F.2d 364, 37 (7th Cir. 1985) (ellipsis in original). Here the indictment is sufficient for Gerber to prepare for trial; therefore, the motion is DENIED.

MOTION FOR *IN CAMERA* INSPECTION OF CO-DEFENDANTS' STATEMENTS

Gerber moves for an *in camera* inspection of co-defendant's statements so that he may "determine the propriety of defendant's motion to sever." Gerber Motion at 1. Since Gerber has no co-defendant's from whom to be

severed at trial, he has no need to determine the propriety of a motion to sever. The motion is DENIED.

DEFENDANT'S DISCOVERY MOTION

Gerber seeks disclosure of various information from the United States. To the extent that this motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States in its brief in response to this motion by Gerber, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this Motion requests disclosure beyond applicable law, the United States is not obligated to provide such discovery. The motion is DENIED.

DEFENDANT'S MOTION FOR PRODUCTION OF GRAND JURY MINUTES AND INFORMATION

Gerber moves for disclosure of grand jury information. To the extent that this motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States in its brief in response to this motion by Gerber, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond that required by applicable law, Gerber must make a showing of particularized need. *United States v. Peters*, 791 F.2d 1270 (7th Cir. 1986). Though Gerber has listed five reasons for seeking the grand jury information, he has not stated any basis for believing that any of these violations have occurred and therefore has failed to present any particularized need. The motion is DENIED.

MOTION FOR DISCLOSURE OF GRAND JURY PROCEDURES

Gerber moves for disclosure of grand jury information. To the extent that this motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States in its brief in response to this motion by Gerber, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond that required by applicable law, Gerber must make a showing of particularized need. *United States v. Peters*, 791 F.2d 1270 (7th Cir. 1986). Gerber has not presented any particularized need. The motion is DENIED.

MOTION FOR DISCLOSURE OF MEANS OF IDENTIFICATION

In reliance on the good faith of the United States in its brief in response to this motion by Gerber, this motion is moot since all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. The motion is DENIED.

MOTION FOR INFORMATION REGARDING GOVERNMENT'S USE OF INFORMANTS

Gerber moves for disclosure of information regarding informants. In reliance on the good faith of the United States in its brief in response to this motion by Gerber, this motion is moot since the United States has asserted there were no informants involved with this investigation. The motion is DENIED.

DEFENDANT'S MOTION FOR PRE-TRIAL DETERMINATION OF THE ADMISSIBILITY OF CO-CONSPIRATORS' STATEMENTS

Gerber moves for a pre-trial determination of the admissibility of his alleged co-conspirators' statements. The United States having presented no objection to the motion, the motion is GRANTED. To permit this Court sufficient time to consider the admissibility of such statements, the United States is ordered to submit its proffer at its earliest convenience.

MOTION FOR PRESERVATION OF TAPES AND NOTES

Gerber presents two requests in this motion. His first request is the preservation of various evidence, documents and other material related to this case which is in the custody or control of the United States. The United States having presented no objection to this part of the motion, it is GRANTED.

The second request Gerber makes in this motion is for disclosure of information concerning witnesses which will be unavailable. To the extent that this part of the motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States as stated generally throughout its brief and specifically in response to the specific motions relating to the disclosure of information concerning witnesses, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond applicable law, the United States is not obligated to provide such discovery. The second part of the motion is DENIED.

The motion is GRANTED IN PART and DENIED IN PART.

MOTION FOR DISCLOSURE AND PRODUCTION OF EVIDENCE THAT IS FAVORABLE TO THE ACCUSED

To the extent that this motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States in its brief in response to this motion by Gerber, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond applicable law, the United States is not obligated to provide such discovery. The motion is DENIED.

DEFENDANT'S MOTION FOR DISCOVERY OF STATEMENTS OF CO-DEFENDANTS AND ALLEGED CO-CONSPIRATORS

Gerber requests permission to copy or inspect relevant documented statements made by co-defendants or co-conspirators. 18 U.S.C. § 3500 provides that, "no statement or report in the possession of the United States which was made by a Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." Section 3500 prohibits this Court from granting the relief sought by Gerber. The motion is DENIED.

MOTION TO INTERVIEW CO-CONSPIRATOR GOVERNMENT WITNESSES

Gerber moves to interview co-conspirator government witnesses. A criminal defendant is not entitled to an interview with potential government witnesses. *United States v. Cutler*, 806 F.2d 933 (9th Cir. 1986). The motion is DENIED.

MOTION FOR NOTICE OF INTENTION TO USE EVIDENCE

To the extent that this motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States in its brief in response to this motion by Gerber, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond applicable law, the United States is not obligated to provide such discovery. The motion is DENIED.

MOTION TO INVERVIEW GOVERNMENT WITNESSES

Gerber moves to inverview "all eyewitnesses to the acts and transactions alleged in Counts One through Seven inclusive upon whom the Government intends to rely at trial and for whom the Government claims in [sic] informant's privilege." In reliance on the good faith of the United States in its brief in response to this motion by Gerber, this motion is moot since the United States has asserted there are no such persons. The motion is DENIED.

MOTION FOR EXCULPATORY EVIDENCE

Gerber notes in his memorandum in support of this motion that it was filed because the United States had not provided discovery information prior to the deadline for filing these motions. Nevertheless, to the extent that this motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States in its brief in response to this motion by Gerber, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond applicable law, the United States is not obligated to provide such discovery. The motion is DENIED.

MOTION TO DISCLOSE THE IDENTITIES OF INFORMANTS AND SOURCES

Gerber moves for disclosure of information regarding informants. In reliance on the good faith of the United States in its brief in response to this motion by Gerber, this motion is moot since the United States has asserted there were no informants involved with this investigation. The motion is DENIED.

IT IS SO ORDERED this 28th day of January 1992 in Evansville, Indiana.

/s/ GENE E. BROOKS
GENE E. BROOKS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

Distribution to Counsel of Record

[Sentence — July 8, 1992]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA

v. Case Number: EV 91-19-CR-01

Arthur Joseph Gerber, Jr.
(Name of Defendant)

Jeffery L. Lantz
Defendant's Attorney

THE DEFENDANT:

[X] Pleaded guilty to count(s) 3, 4, 5, 6, 7.
[ ] Was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

PLEASE SEE PAGE 1a REGARDING OFFENSES.

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
[X] Count(s) 1, 2 (are) dismissed on the motion of the United States.
[X] It is ordered that the defendant shall pay to the United States a special assessment of $125.00, for count(s) 3, 4, 5, 6, 7, which shall be due [X] immediately [ ] as follows:

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

* * * * *

July 8, 1992
Date of Imposition of Sentence

/s/ GENE E. BROOKS
Signature of Judicial Officer

Gene E. Brooks
Chief U.S. District Court Judge
Name and Title of Judicial Officer

July 14, 1992
Date

UNITED STATES DISTRICT COURT–
SOUTHERN DISTRICT OF INDIANA
JUDGMENT IN A CRIMINAL CASE

Defendant: Arthur Joseph Gerber, Jr.
Case Number: EV 91-19-CR-01
Page 1a

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
16:470ee(c)&(d)	Interstate Transportation of Archaeological Resources	07-24-88	3
16:470ee(c)&(d)	Interstate Transportation of Archaeological Resources	07-26-88	4
16:470ee(c)&(d)	Interstate Transportation of Archaeological Resources	07-31-88	5
16:470ee(c)&(d)	Interstate Transportation of Archaeological Resources	08-88	6
16:470ee(c)&(d)	Interstate Transportation of Archaeological Resources	07-89	7

Judgment—Page 2 *of* 5

Defendant: Arthur Joseph Gerber, Jr.
Case Number: EV 91-19-CR-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:

12 months on each of Counts 3, 4, 5, 6 & 7 concurrent. This sentence is stayed pending the outcome of this appeal.

* * * * *

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2:00 p.m. on _____.

[X] as notified by the United States Marshal.
[ ] as notified by the Probation Office.

RETURN

* * * * *

Judgment—Page 3 *of* 5

Defendant: Arthur Joseph Gerber, Jr.
Case Number: EV 91-19-CR-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Count 3 one (1) year; Count 4 one (1) year consecutive; Count 5 one (1) year consecutive to Counts 3 and 4.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this Judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the

term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[X] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

1. The defendant shall not, during the term of supervised release, engage directly or indirectly in the sale, purchase, barter, or excavation of any archaeological resources. However, with the consent of the Probation Office, the defendant may sell any archaeological resources lawfully in his possession in order to satisfy any fine imposed by this Court. Further, the defendant shall not, during the term of supervised release, sponsor, organize, or attend directly or indirectly any shows or exhibitions which have significant archaeological resource elements. However, with the consent of the Probation Office the defendant may attend a show or shows for the purpose of selling any archaeological resources lawfully in his possession in order to satisfy any fine imposed by this Court.

STANDARD CONDITIONS OF SUPERVISION

* * * * *

Judgment—Page 4 *of* 5

Defendant: Arthur Joseph Gerber, Jr.
Case Number: EV 91-19-CR-01

FINE

The defendant shall pay a fine of $5,000.00. The fine includes any costs of incarceration and/or supervision.

[X] This amount is the total of the fines imposed on individual counts, as follows:

Count 3: $5,000.00.

[ ] The Court has determined that the Defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[X] in installments according to the following schedule of payments:

As arranged by the probation officer.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. 3614.

Judgment—Page 5 *of* 5

Defendant: Arthur Joseph Gerber, Jr.
Case Number: EV 91-19-CR-01

STATEMENT OF REASONS

[ ] The Court adopts the factual findings in the presentence report as to the applicable guideline factors,

OR

[X] The Court adopts the factual findings in the presentence report as to the applicable guideline factors except: (See attachments if necessary)

Guideline Range as Determined by the Court:

Total Offense Level: 13
Criminal History Category: I
Imprisonment Range: 12 to 18 months
Supervised Release Range: 0 to 1 years
Fine Range: $3,000.00 to $30,000.00
(plus $1,492.00 cost of imprisonment and $115.30 cost of supervision per month) _____
$_____ Restitution
$125.00 Special Assessment

[ ] Fine waived or imposed below guideline range because of inability to pay.

[ ] Sentence Imposed is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

[ ] Because the width of the guideline range exceeds 24 months, the reason for selecting this particular point within the range is:

[X] The Court departs from the Guideline (See attachments if necessary)

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[X] for the following reason(s):

The term of supervised release is increased to three years in order to allow the defendant more time in which to pay the fine due to his limited resources. Further, the special condition prohibiting archaeological resource activity needs to be in effect longer than one year for the protection of society

[ ] Court orders transcript of Statement of Reasons to be attached.

16 U.S.C. §§ 470aa-470mm

§ 470aa. Congressional findings and declaration of purpose

(a) The Congress finds that—

(1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;

(2) these resources are increasingly endangered because of their commercial attractiveness;

(3) existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and

(4) there is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.

(b) The purpose of this chapter is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before October 31, 1979.

(Pub. L. 96-95, § 2, Oct. 31, 1979, 93 Stat. 721.)

SHORT TITLE

Section 1 of Pub. L. 96-95 provided that: "This Act [enacting this chapter] may be cited as the 'Archaeological Resources Protection Act of 1979'."

§ 470bb. Definitions

As used in this chapter—

(1) The term "archaeological resource" means any material remains of past human life or activities which are

of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

(2) The term "Federal land manager" means, with respect to any public lands, the Secretary of the department, or the head of any other agency or instrumentality of the United States, having primary management authority over such lands. In the case of any public lands or Indian lands with respect to which no department, agency, or instrumentality has primary management authority, such term means the Secretary of the Interior. If the Secretary of the Interior consents, the responsibilities (in whole or in part) under this chapter of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary of the Interior with respect to any land managed by such other Secretary or agency head, and in any such case, the term "Federal land manager" means the Secretary of the Interior.

(3) The term "public lands" means—

(A) lands which are owned and administered by the United States as part of—

(i) the national park system,

(ii) the national wildlife refuge system, or

(iii) the national forest system; and

(B) all other lands the fee title to which is held by the United States, other than lands on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution.

(4) The term "Indian lands" means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. § 1601 et seq.].

(6) The term "person" means an individual, corporation, partnership, trust, institution, association, or any other private entity or any officer, employee, agent, department, or instrumentality of the United States, of any Indian tribe, or of any State or political subdivision thereof.

(7) The term "State" means any of the fifty States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

(Pub. L. 96-95, § 3, Oct. 31, 1979, 93 Stat. 721; Pub. L. 100-588, § 1(a), Nov. 3, 1988, 102 Stat. 1983.)

REFERENCES IN TEXT

The Alaska Native Claims Settlement Act, referred to in par. (5), is Pub. L. 92-203, Dec. 18, 1971, 85 Stat. 688, as amended, which is classified generally to chapter 33 (section 1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43 and Tables.

AMENDMENTS

1988—Par. (3). Pub. L. 100-588 substituted at the end a period for a semicolon.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 470ii of this title.

§ 470cc. Excavation and removal

(a) Application for permit

Any person may apply to the Federal land manager for a permit to excavate or remove any archaeological resource located on public lands or Indian lands and to carry out activities associated with such excavation or removal. The application shall be required, under uniform regulations under this chapter, to contain such information as the Federal land manager deems necessary, including information concerning the time, scope, and location and specific purpose of the proposed work.

(b) Determinations by Federal land manager prerequisite to issuance of permit

A permit may be issued pursuant to an application under subsection (a) of this section if the Federal land manager determines, pursuant to uniform regulations under this chapter, that—

(1) the applicant is qualified, to carry out the permitted activity,

(2) the activity is undertaken for the purpose of furthering archaeological knowledge in the public interest,

(3) the archaeological resources which are excavated or removed from public lands will remain the property of the United States, and such resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution, and

(4) the activity pursuant to such permit is not inconsistent with any management plan applicable to the public lands concerned.

(c) Notification to Indian tribes of possible harm to or destruction of sites having religious or cultural importance

If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be

deemed a disclosure to the public for purposes of section 470hh of this title.

(d) Terms and conditions of permit

Any permit under this section shall contain such terms and conditions, pursuant to uniform regulations promulgated under this chapter, as the Federal land manager concerned deems necessary to carry out the purposes of this chapter.

(e) Identification of individuals responsible for complying with permit terms and conditions and other applicable laws

Each permit under this section shall identify the individual who shall be responsible for carrying out the terms and conditions of the permit and for otherwise complying with this chapter and other law applicable to the permitted activity.

(f) Suspension or revocation of permits; grounds

Any permit issued under this section may be suspended by the Federal land manager upon his determination that the permittee has violated any provision of subsection (a), (b), or (c) of section 470ee of this title. Any such permit may be revoked by such Federal land manager upon assessment of a civil penalty under section 470ff of this title against the permittee or upon the permittee's conviction under section 470ee of this title.

(g) Excavation or removal by Indian tribes or tribe members; excavation or removal of resources located on Indian lands

(1) No permit shall be required under this section or under the Act of June 8, 1906 (16 U.S.C. 431), for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe, except that in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this section.

(2) In the case of any permits for the excavation or removal of any archaeological resource located on Indian lands, the permit may be granted only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe.

(h) Permits issued under Antiquities Act of 1906

(1) No permit or other permission shall be required under the Act of June 8, 1906 (16 U.S.C. 431-433), for any activity for which a permit is issued under this section.

(2) Any permit issued under the Act of June 8, 1906 [16 U.S.C. §§ 431-433], shall remain in effect according to its terms and conditions following the enactment of this chapter. No permit under this chapter shall be required to carry out any activity under a permit issued under the Act of June 8, 1906, before October 31, 1979, which remains in effect as provided in this paragraph, and nothing in this chapter shall modify or affect any such permit.

(i) Compliance with provisions relating to undertakings on property listed in the National Register not required

Issuance of a permit in accordance with this section and applicable regulations shall not require compliance with section 470f of this title.

(j) Issuance of permits to State Governors for archaeological activities on behalf of States or their educational institutions

Upon the written request of the Governor of any State, the Federal land manager shall issue a permit, subject to the provisions of subsections (b) (3), (b) (4), (c), (e), (f), (g), (h), and (i) of this section for the purpose of conducting archaeological research, excavation, removal, and curation, on behalf of the State or its educational institutions, to such Governor or to such designee as the Governor deems qualified to carry out the intent of this chapter.

(Pub. L. 96-95, § 4, Oct. 31, 1979, 93 Stat. 722.)

REFERENCES IN TEXT

The Act of June 8, 1906, referred to in subsecs. (g)(1) and (h), is Act June 8, 1906, c. 3060, 34 Stat. 225, known as the Antiquities Act of 1906, which is classified generally to sections 431, 432 and 433 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 431 of this title and Tables.

Following the enactment of this chapter, referred to in subsec. (h)(2), means following the enactment of Pub. L. 96-95, approved Oct. 31, 1979.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to on section 470ee of this title; title 25 section 3002.

§ 470dd. Custody of archaeological resources

The Secretary of the Interior may promulgate regulations providing for—

(1) the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from public lands and Indian lands pursuant to this chapter, and

(2) the ultimate disposition of such resources and other resources removed pursuant to the Act of June 27, 1960 (16 U.S.C. 469-469c) [16 U.S.C. §§ 469-469c-1] or the Act of June 8, 1906 (16 U.S.C. 431-433).

Any exchange or ultimate disposition under such regulation of archaeological resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands. Following promulgation of regulations under this section, notwithstanding any other provision of law, such regulations shall govern the disposition of archaeological resources removed from public lands and Indian lands pursuant to this chapter.

(Pub. L. 96-95, § 5, Oct. 31, 1979, 93 Stat. 724.)

REFERENCES IN TEXT

The Act of June 27, 1960 (16 U.S.C. 469-469c), referred to in par. (2), is Act June 27, 1960, Pub. L. 86-523, 74 Stat. 220, as amended, which is classified generally to sections 469 to 469c-1 of this title. For complete classification of this Act to the Code, see Tables.

The Act of June 8, 1906 (16 U.S.C. 431-433), referred to in par. (2) is Act June 8, 1906, c. 3060, 34 Stat. 225, known as the Antiquities Act of 1906, which is classified generally to sections 431, 432 and 433 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 431 of this title and Tables.

§ 470ee. Prohibited acts and criminal penalties

(a) Unauthorized excavation, removal, damage, alteration, or defacement of archaeological resources

No person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 470cc of this title, a permit referred to in section 470cc(h)(2) of this title, or the exemption contained in section 470cc(g)(1) of this title.

(b) Trafficking in archaeological resources the excavation or removal of which was wrongful under Federal law

No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of—

(1) the prohibition contained in subsection (a) of this section, or

(2) any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

(c) Trafficking in interstate or foreign commerce in archaeological resources the excavation, removal, sale, purchase, exchange, transportation or receipt of which was wrongful under State or local law

No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

(d) Penalties

Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be fined not more than $10,000 or imprisoned not more than one year, or both: Provided, however, That if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $500, such person shall be fined not more than $20,000 or imprisoned not more than two years, or both. In the case of a second or subsequent such violation upon conviction such person shall be fined not more than $100,000, or imprisoned not more than five years, or both.

(e) Effective date

The prohibitions contained in this section shall take effect on October 31, 1979.

(f) Prospective application

Nothing in subsection (b) (1) of this section shall be deemed applicable to any person with respect to an archaeological resource which was in the lawful possession of such person prior to October 31, 1979.

(g) Removal of arrowheads located on ground surface

Nothing in subsection (d) of this section shall be deemed applicable to any person with respect to the removal of arrowheads located on the surface of the ground.

(Pub. L. 96-95, § 6, Oct. 31, 1979, 93 Stat. 724.; Pub. L. 100-588, § 1(b), (c), Nov. 3, 1988, 102 Stat. 2983.)

AMENDMENTS

1988—Subsec. (a). Pub. L. 100-588, § 1(b), inserted ", or attempt to excavate, remove, damage, or otherwise alter or deface" after "deface".

Subsec. (d). Pub. L. 100-588, § 1(c), substituted "$500" for "$5,000".

§ 470ff. Civil penalties

(a) Assessment by Federal land manager

(1) Any person who violates any prohibition contained in an applicable regulation or permit issued under this chapter may be assessed a civil penalty by the Federal land manager concerned. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Federal land manager concerned.

(2) The amount of such penalty shall be determined under regulations promulgated pursuant to this chapter, taking into account, in addition to other factors—

(A) the archaeological or commercial value of the archaeological resource involved, and

(B) the cost of restoration and repair of the resource and the archaeological site involved.

Such regulations shall provide that, in the case of a second or subsequent violation by any person, the amount of such civil penalty may be double the amount which would have been assessed if such violation were the first violation by such person. The amount of any penalty assessed under this subsection for any violation shall not

exceed an amount equal to double the cost of restoration and repair of resources and archaeological sites damaged and double the fair market value of resources destroyed or not recovered. (3) No penalty shall be assessed under this section for the removal of arrowheads located on the surface of the ground.

(b) Judicial review of assessed penalties; collection of unpaid assessments

(1) Any person aggrieved by an order assessing a civil penalty under subsection (a) of this section may file a petition for judicial review of such order with the United States District Court for the District of Columbia or for any other district in which such a person resides or transacts business. Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued. The court shall hear such action on the record made before the Federal land manager and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(2) If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment has become a final order and such person has not filed a petition for judicial review of the order in accordance with paragraph (1), or

(B) after a court in an action brought under paragraph (1) has entered a final judgment upholding the assessment of a civil penalty,

the Federal land managers may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. In such action, the validity and amount of such penalty shall not be subject to review.

(c) Hearings

Hearings held during proceedings for the assessment of civil penalties authorized by subsection (a) of this section

shall be conducted in accordance with section 554 of title 5. The Federal land manager may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Federal land manager or to appear and produce documents before the Federal land manager, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(Pub. L. 96-95, § 7, Oct. 31, 1979, 93 Stat. 725.)

SECTION REFERRED TO
IN OTHER SECTIONS

This section is referred to in sections 470cc, 470gg of this title.

§ 470gg. Enforcement

(a) Rewards

Upon the certification of the Federal land manager concerned, the Secretary of the Treasury is directed to pay from penalties and fines collected under sections 470ee and 470ff of this title an amount equal to one-half of such penalty or fine, but not to exceed $500, to any person who furnishes information which leads to the finding of a civil violation, or the conviction of criminal violation, with respect to which such penalty or fine was paid. If several persons provided such information, such amount shall be divided among such persons. No officer or employee of the United States or of any State or local

government who furnishes information or renders service in the performance of his official duties shall be eligible for payment under this subsection.

(b) Forfeitures

All archaeological resources with respect to which a violation of subsection (a), (b), or (c) of section 470ee of this title occurred and which are in the possession of any person, and all vehicles and equipment of any person which were used in connection with such violation, may be (in the discretion of the court or administrative law judge, as the case may be) subject to forfeiture to the United States upon—

(1) such person's conviction of such violation under section 470ee of this title,

(2) assessment of a civil penalty against such person under section 470ff of this title with respect to such violation, or

(3) a determination by any court that such archaeological resources, vehicles, or equipment were involved in such violation.

(c) Disposition of penalties collected and items forfeited in cases involving archaeological resources excavated or removed from Indian lands

In cases in which a violation of the prohibition contained in subsection (a), (b), or (c) of section 470ee of this title involve archaeological resources excavated or removed from Indian lands, the Federal land manager or the court, as the case may be, shall provide for the payment to the Indian or Indian tribe involved of all penalties collected pursuant to section 470ff of this title and for the transfer to such Indian or Indian tribe of all items forfeited under this section.

(Pub. L. 96-95, § 8, Oct. 31, 1979, 93 Stat. 726.)

§ 470hh. Confidentiality of information concerning nature and location of archaeological resources

(a) Disclosure of information

Information concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under this chapter or under any other provision of Federal law may not be made available to the public under subchapter II of chapter 5 of Title 5 or under any other provision of law unless the Federal land manager concerned determines that such disclosure would—

(1) further the purposes of this chapter or the Act of June 27, 1960 (16 U.S.C. 469-469c) [16 U.S.C. §§ 469-469c-1], and

(2) not create a risk of harm to such resources or to the site at which such resources are located.

(b) Request for disclosure by Governors

Notwithstanding the provisions of subsection (a) of this section, upon the written request of the Governor of any State, which request shall state—

(1) the specific site or area for which information is sought,

(2) the purpose for which such information is sought,

(3) a commitment by the Governor to adequately protect the confidentiality of such information to protect the resource from commercial exploitation,

the Federal land manager concerned shall provide to the Governor information concerning the nature and location of archaeological resources within the State of the requesting Governor.

(Pub. L. 96-95, § 9, Oct. 31, 1979, 93 Stat. 727.)

REFERENCES IN TEXT

Act of June 27, 1960 (16 U.S.C. 469-469c), referred to in subsec. (a)(1), is act June 27, 1960, Pub. L. 86-523, 74 Stat. 220, as amended, which is classified generally to sections 469-469c-1 of this title. For complete classification of this Act to the Code, see Tables.

SECTION REFERRED TO
IN OTHER SECTIONS

This section is referred to in section 470cc of this title.

§ 470ii. Rules and regulations; intergovernmental coordination

(a) Promulgation; effective date

The Secretaries of the Interior, Agriculture and Defense and the Chairman of the Board of the Tennessee Valley Authority, after consultation with other Federal land managers, Indian tribes, representatives of concerned State agencies, and after public notice and hearing, shall promulgate such uniform rules and regulations as may be appropriate to carry out the purposes of this chapter. Such rules and regulations may be promulgated only after consideration of the provisions of the American Indian Religious Freedom Act (92 Stat. 469; 42 U.S.C. 1996). Each uniform rule or regulation promulgated under this chapter shall be submitted on the same calendar day to the Committee on Energy and Natural Resources of the United States Senate and to the Committee on Interior and Insular Affairs of the United States House of Representatives, and no such uniform rule or regulation may take effect before the expiration of a period of ninety calendar days following the date of its submission to such Committees.

(b) Federal land managers' rules

Each Federal land manager shall promulgate such rules and regulations, consistent with the uniform rules and regulations under subsection (a) of this section, as may be appropriate for the carrying out of his functions and authorities under this chapter.

(c) Federal land managers' public awareness program of resources on public lands and Indian lands

Each Federal land manager shall establish a program to increase public awareness of the significance of the ar-

chaeological resources located on public lands and Indian lands and the need to protect such resources. Each such land manager shall submit an annual report to the Committee on Interior and Insular Affairs of the United States House of Representatives and to the Committee on Energy and Natural Resources of the United States Senate regarding the actions taken under such program.

(Pub. L. 96-95, § 10, Oct. 31, 1979, 93 Stat. 727; Pub. L. 100-588, § 1(d), Nov. 3, 1988, 102 Stat. 2983.)

REFERENCES IN TEXT

The American Indian Religious Freedom Act, referred to in subsec. (a), is Pub. L. 95-342, Aug. 11, 1978, 92 Stat. 471, which enacted section 1996 of Title 42, The Public Health and Welfare, and provision set out as a note under section 1996 of Title 42. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

1988—Subsec. (c). Pub. L. 100-588 added subsec. (c).

§ 470jj. Cooperation with private individuals

The Secretary of the Interior shall take such action as may be necessary, consistent with the purposes of this chapter, to foster and improve the communication, cooperation, and exchange of information between—

(1) private individuals having collections of archaeological resources and data which were obtained before October 31, 1979, and

(2) Federal authorities responsible for the protection of archaeological resources on the public lands and Indian lands and professional archaeologists and associations of professional archaeologists.

In carrying out this section, the Secretary shall, to the extent practicable and consistent with the provisions of this chapter, make efforts to expand the archaeological data base for the archaeological resources of the United States through increased cooperation between private indi-

viduals referred to in paragraph (1) and professional archaeologists and archaeological organizations.

(Pub. L. 96-95, § 11, Oct. 31, 1979, 93 Stat. 727.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 470*ll* of this title.

§ 470kk. Savings provisions

(a) Mining, mineral leasing, reclamation, and other multiple uses

Nothing in this chapter shall be construed to repeal, modify, or impose additional restrictions on the activities permitted under existing laws and authorities relating to mining, mineral leasing, reclamation, and other multiple uses of the public lands.

(b) Private collections

Nothing in this chapter applies to, or requires a permit for, the collection for private purposes of any rock, coin, bullet, or mineral which is not an archaeological resource, as determined under uniform regulations promulgated under section 470bb(1) of this title.

(c) Lands within chapter

Nothing in this chapter shall be construed to affect any land other than public land or Indian land or to affect the lawful recovery, collection, or sale of archaeological resources from land other than public land or Indian land.

(Pub. L. 96-95, § 12, Oct. 31, 1979, 93 Stat. 728.)

§ 470*ll*. Annual report to Congress

As part of the annual report required to be submitted to the specified committees of the Congress pursuant to section 469a-3(c) of this title, the Secretary of the Interior shall comprehensively report as a separate component on the activities carried out under the provisions of this

chapter, and he shall make such recommendations as he deems appropriate as to changes or improvements needed in the provisions of this chapter. Such report shall include a brief summary of the actions undertaken by the Secretary under section 470jj of this title, relating to cooperation with private individuals.

(Pub. L. 96-95, § 13, Oct. 31, 1979, 93 Stat. 728.)

§ 470mm. Surveying of lands; reporting of violations

The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Board of the Tennessee Valley Authority shall—

(a) develop plans for surveying lands under their control to determine the nature and extent of archaeological resources on those lands;

(b) prepare a schedule for surveying lands that are likely to contain the most scientifically valuable archaeological resources; and

(c) develop documents for the reporting of suspected violations of this chapter and establish when and how those documents are to be completed by officers, employees, and agents of their respective agencies.

(Pub. L. 96-95, § 14, as added Pub. L. 100-555, Oct. 28, 1988, 102 Stat. 2778.)

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No. 93-635

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR J. GERBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICI CURIAE* IN SUPPORT OF THE PETITION OF ARTHUR J. GERBER

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AMERICAN SOCIETY FOR AMATEUR ARCHAEOLOGY
ANTIQUE TRIBAL ARTS DEALER ASSOCIATION, INC.
ARCHAEOLOGICAL SOCIETY OF OHIO, INC.
ARKANSAS TREASURE SEEKERS
BLACK THUNDER MARKETING
CENTRAL STATES ARCHAEOLOGICAL SOCIETIES, INC.
CIVIL WAR NEWS
COIN WORLD
CONCH COALITION, INC.
DOUBLE EAGLE PUBLISHING
FEDERATION OF METAL DETECTING AND
ARCHAEOLOGICAL CLUBS, INC.
FISHER RESEARCH LAB., INC.
GARRETT ELECTRONICS, INC.
GOLD PROSPECTORS ASSOCIATION OF AMERICA, INC.
HORIZON DISTRIBUTING CORPORATION
INDIAN-ARTIFACT MAGAZINE, INC.
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LOST TREASURE, INC.
MID-JERSEY RESEARCH & RECOVERY CLUB
MINELAB ELECTRONICS, PTY. LTD.
MODERN GOLD MINER'S ASSOCIATION, INC.
MOTHER LODE RESEARCH CENTER
NATIONAL SOCIETY OF METAL DETECTORISTS, INC.
NORTH COAST RECOVERY ASSOCIATION OF OHIO
PEOPLE'S PUBLISHING CO., INC.
PUBLISHER'S PRESS, INC.
ROADRUNNER PROSPECTORS CLUB, INC.
SMITH COUNTY METAL DETECTING ASSOCIATION
SOCIETY FOR DOCUMENTATION OF PREHISTORIC AMERICA
SOUTH MOUNTAIN RELIC AND COIN CLUB
TESORO ELECTRONICS, INC.
TEXAS COUNCIL OF TREASURE CLUBS
TREASURE COAST COALITION, INC.
TREASURE QUEST MAGAZINE, INC.
TYNDALL ELECTRONICS, INC.
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BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION OF ARTHUR J. GERBER

With written consent of the Petitioner and the Respondent, filed concurrently herewith, amici curiae ("amici") submit this brief as amici curiae in support of the Petition of Arthur. J. Gerber for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

INTEREST OF AMICI CURIAE

Amici consist of the following organizations: The American Numismatic Association (ANA) (a non-profit educational corporation chartered by the United States Congress with

over 29,000 members, devoted to the science and hobby of collecting coins, medals, tokens, and paper money); American Society for Amateur Archaeology (an organization of several hundred amateur scientists and archaeologists, located in Buffalo, New York); Antique Tribal Arts Dealer Association, Inc. (ATADA) (an organization consisting of 166 members committed to full and fair disclosure in its dealers' trade practices and in ensuring that its dealers' business practices respect those cultures which it affects); Archaeological Society of Ohio, Inc. (an association of 2,758 collectors, interested citizens, and avocational and professional archaeologists, located in Plain City, Ohio, devoted to locating, reporting, and preserving archaeological sites and material, and serving as a bond between professional and non-professional archaeologists to disseminate information); Arkansas Treasure Seekers (an association of metal detectorists located in Hot Springs, Arkansas); Black Thunder Marketing (an advertising and marketing division of Rock Bridge Enterprises, Inc., which targets collectors of Civil War items, located in Berryville, Virginia); *Civil War News* (a magazine owned by Cutter and Lock, Inc., devoted to the Civil War, with 8,000 subscribers); Central States Archaeological Societies, Inc. (an amateur archaeological association located in Saint Louis, Missouri, with over 4,000 members residing in Illinois, Missouri, Indiana, Arkansas, Kentucky, Tennessee, Iowa, Wisconsin, Georgia, Alabama, Michigan, North Carolina, and South Carolina); *Coin World* (a news weekly, owned by Amos Press, Inc., with 62,400 subscribers published for collectors of coins, medals, and tokens); Conch Coalition, Inc. (a 2,000-member organization of amateur and professional divers, located in Marathon, Florida, who pursue historical research and artifact recovery); Double Eagle Publishing (a publisher located in Yucaipa, California, which publishes three magazines with a combined readership of over 100,000,

with a focus on metal detecting and historical research); Federation of Metal Detecting and Archaeological Clubs, Inc. (FMDAC) (a federation of clubs, with several thousand members nationwide, devoted to metal detecting and amateur archaeology); Fisher Research Lab., Inc. (a manufacturer of metal detectors located in Los Banos, California); Garrett Electronics, Inc. (a manufacturer of metal detectors and security devices located in Garland, Texas); Gold Prospectors Association of America, Inc. (GPAA) (an association of gold prospectors and treasure hunters with over 125,000 members and over 250,000 subscribers to its magazine, located in Bonsall, California); Horizon Distributing Corporation (a distributor of metal detectors located in Painesville, Ohio); Indian-Artifact Magazine, Inc. (publisher of *Indian-Artifact Magazine*, a magazine devoted to Native American artifacts, published in Turbotville, Pennsylvania, with over 4,000 subscribers); Krause Publications (publisher of over twenty titles, serving a wide variety of collecting audiences, with 610,000 subscribers and companion newsstand distribution of 1,200,000, located in Iola, Wisconsin); Lost Treasure, Inc. (the publisher of *Lost Treasures* magazine, with articles on metal detecting and treasure hunting, and readership in excess of 150,000); Mid-Jersey Research & Recovery Club (a 2,000-member association of metal detectorists from the mid-Atlantic coast, located in New Egypt, New Jersey); Minelab Electronics, Pty. Ltd. (an Australian manufacturer of metal detectors); Modern Gold Miner's Association, Inc. (a 3,000-member organization devoted to gold mining and recreational treasure hunting located in Happy Camp, California, and publisher of *Gold and Treasure Hunter* magazine); Mother Lode Research Center (a think tank for land reform, located in Auburn, California); National Society of Metal Detectorists, Inc. (a non-profit organization of metal detectorists with nationwide membership); North Coast

Recovery Association of Ohio (a club with fifty members devoted to metal detecting, located in Painesville, Ohio); People's Publishing Co., Inc. (a publisher of metal detecting magazines, with monthly readership in excess of 100,000, located in Arcata, California); Publisher's Press, Inc. (publishers and sponsors of *North South Trader's Civil War* collector's magazine with over 20,000 readers, North South Trader's Civil War collectors's price guide, and North South Trader's National Civil War Show, located in Orange, Virginia); Roadrunner Prospectors Club, Inc. (a group of prospectors and treasure hunters, located in Phoenix, Arizona); Smith County Metal Detecting Association (a metal detecting club located in Flint, Texas); Society for Documentation of Prehistoric America (a 900-member organization located in Rochester, Indiana, devoted to collecting and studying Native American antiquities); South Mountain Relic and Coin Club (a club whose members have interests in Civil War relics, coins, medals, and tokens, located in Hagerstown, Maryland); Tesoro Electronics, Inc. (a manufacturer of metal detectors, located in Prescott, Arizona); Texas Council of Treasure Clubs (an organization of metal detectorists located in Gilmer, Texas, with 2,000 members); Treasure Coast Coalition, Inc. (a diverse group committed to opposing excess government control, located in Sebastian, Florida); Treasure Quest Magazine, Inc. (publisher of *Treasure Quest* magazine, a magazine focusing on archaeology, paleontology, and Native American artifacts, located in McLeam, Virginia); Tyndall Electronics, Inc. (a manufacturer of metal detectors designed specifically for locating Civil War relics, located in Coats, North Carolina); and White's Electronics, Inc. (a manufacturer of metal detectors, located in Sweet Home, Oregon).

As the above list indicates, amici are a diverse group both geographically and in terms of their interests and pursuits. Amici primarily engage in activities from one or more of the following broad categories: amateur archaeology, treasure hunting, metal detecting, or marine salving; collecting, buying, and selling antiquities, Civil War relics, Native American artifacts, bottles, coins, tokens, medals, and the like; and participation in industries related to these hobbies, such as publishing magazines and trade journals, and manufacturing and distributing metal detectors and related items.

Amici believe that review of the decision below is imperative both because the court of appeals misapplied the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm ("ARPA"), and because the precedent set by the court of appeals' confusing and erroneous decision may unnecessarily inhibit a vast number of individuals and businesses from pursuing a wide range of activities pertaining to "archaeological resources" that are not and should not be violative of ARPA.

The court of appeals held that ARPA applied to archaeological resources removed from private lands. *United States v. Gerber*, 999 F.2d 1112, 1115 (7th Cir. 1993). Amici have a strong interest in that holding because virtually all of amici's activities involve private land or items removed from private land. Significantly, the court of appeals' holding marked the first time that ARPA has been extended to private lands. *Id.* at 1113. Since ARPA's inception, amici believed that ARPA does not extend to private lands based on the scholarly commentaries, the government's written interpretation, and Congress' intent in enacting ARPA (as stated in the act and its legislative history). Although the court of appeals' decision involved

removing artifacts from private property without the owner's express consent, many hobbyists seek "archaeological resources" on their own land or on private land with the owner's consent. Of particular concern to amici is the distinct possibility that individuals will now be subject to ARPA's criminal provisions for removing archaeological objects from their own land or from private land, even though they had obtained the owner's consent. In addition, collectors and dealers, who previously thought they were immune from ARPA when they purchased artifacts excavated from private property, no longer have that security. Therefore, amici have a compelling interest in seeing that the court of appeals' holding on the private land issue is scrutinized by this Court.

The court of appeals also held that the violation of a state or local law, regulation, ordinance, or permit that triggers Section 470ee(c) of ARPA need only be "related" to protecting archaeological sites and objects, and that the underlying violation need not involve a cultural resources protection law of the type that all fifty states have enacted. *Id.* at 1116. Amici oppose this aspect of the court of appeals' decision. The court of appeals' newly-formed standard is altogether unclear, and, as a result, amici (and their members, readers, dealers, and customers) will be left to guess whether inadvertent or purely technical violations of a wide variety of state civil laws and municipal ordinances will subject them to ARPA's forfeiture and criminal provisions. It is feared that the lack of clarity in the court of appeals' relatedness standard will have a chilling effect on amateur archaeologists, treasure hunters, metal detectorists, artifact collectors, and antiquities collectors, as these citizens choose not to pursue their lawful hobbies rather than face the risk that they may be found to have

unwittingly violated ARPA's criminal provisions.[1] Amici thus have a strong interest in seeking clarification of the court of appeals' holding concerning the requisite state or local law violation referred to in Section 470ee(c) of ARPA.

The combined effect of the court of appeals' decision casts a cloud over the hobbies, activities, and businesses engaged in by amici. That decision threatens the vitality of collectors and dealers of a wide variety of objects of archaeological significance that are older than 100 years old, such as Civil War relics, Native American artifacts, antiquities, bottles, coins, tokens, medals, and the like. The court of appeals' decision also threatens to curtail vastly the industries that are supported by collectors, dealers, archaeologists, marine salvors, and metal detectorists. That is unfortunate because the court of appeals' decision on these important issues appears to be fundamentally flawed. Therefore, absent clarification by this Court over the scope and meaning of Section 470ee(c) of ARPA, amici may wrongly be subjected to ARPA's provisions.

Amici wish to emphasize that they do not support the illegal digging of archaeological objects and sites located on federal and Indian lands or the unlawful digging of burial sites. In that regard, amici strongly support the federal government's use of ARPA and other laws to pre-

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[1] Amici realize that under Section 470ee(c) and the court of appeals' ruling, some law must be violated in order to trigger Section 470ee(c). However, amici believe that violating a civil ordinance or statute that is deemed by a court as "related" to protecting archaeological resources under some as of yet undefined standard should not trigger ARPA's criminal and forfeiture provisions, and that the court of appeals should have required the violation of a cultural resources protection law.

vent and punish looting of cultural items located on federal and Indian lands. Unfortunately, ARPA and other existing laws that were enacted for protecting archaeological sites and objects contain loopholes and have been very difficult to enforce.[2] Amici's concern is that in an attempt to close these loopholes, prosecutors and the courts have and will improperly reinterpret existing laws in a way that is fundamentally at odds with Congress' original intent in enacting such legislation. The court of appeals' unprecedented, expansive reading of ARPA appears to be a product of this type of overzealous application of a statute in a manner wholly unintended by Congress. For these reasons, amici have an interest in this case and support the petition of Arthur J. Gerber.

SUMMARY OF ARGUMENT

As amici's interest in this case demonstrates, the writ should be issued because the issues of first impression decided by the court of appeals potentially have a far-reaching effect on amici, as well as archaeologists, metal detectorists, marine salvors, and anyone who collects, excavates, buys, or sells objects older than one-hundred years old that are of archaeological significance, such as Native American artifacts, Civil War relics, antiquities,

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[2] *See, e.g.*, Robert K. Landers, *Is America Allowing its Past to be Stolen?*, Cong. Q.'s Editorial Research Rep. 34, 40 (Jan. 18, 1991) ("Enforcement of ARPA not only frequently failed to result in felony convictions, but sometimes backfired completely"); Linda M. Jones, *Preserving Utah's Cultural Resources: A Proposal for New Legislation*, 10 J. Energy L. & Pol'y 93, 1117 (1989) ("Utah and federal legislation contain numerous loopholes"); Lorrie D. Northey, *The Archaeological Resources Protection Act of 1979: Protecting Prehistory for the Future*, 6 Harv. Envtl. L. Rev. 61, 114 (1982) ("Congress should amend [ARPA] to eliminate unnecessary loopholes").

bottles, medals, tokens, and similar items. The writ should also be granted because the court of appeals erred in applying ARPA to archaeological resources removed from private lands. That holding renders ARPA internally inconsistent, is at odds with Congress' stated intent, and is also at odds with the analysis of scholarly commentators and the Federal government. Finally, the writ should be granted because the court of appeals erred in determining what types of laws trigger Section 470ee(c). The uncertainty and unworkability of that test will create undue confusion both to future courts and to people trying to determine whether they are complying with ARPA.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN APPLYING SECTION 470EE(C) TO ARCHAEOLOGICAL OBJECTS REMOVED FROM PRIVATE LANDS

There are a number of indications that the court of appeals' holding that ARPA applies to private lands is suspect: the language of ARPA, its legislative history, and the conclusions of scholarly commentators and the Federal government. The court of appeals' apparent error here is of particular concern to amici since their activities are almost entirely focussed on private lands and items removed from private lands. If the court of appeals was incorrect in its holding on this issue, then amici will be needlessly subjected to ARPA's provisions.

First, the language of ARPA itself argues against the court of appeals' holding. ARPA's stated purpose is "the protection of archaeological resources which are on public and Indian lands . . . ." 16 U.S.C. § 470aa(b). In addition there is no mention of private lands or of any

lands other than "public and Indian lands" anywhere in ARPA. Had Congress intended for ARPA to apply to private lands, amici believe that ARPA would clearly state as much, particularly in light of the ramifications of including private land within ARPA's coverage. Also, even the court of appeals took note of the fact that if ARPA applies to private lands its provisions do not "jibe perfectly with the surrounding provisions," and that such an application would render ARPA both overinclusive and underinclusive. *Gerber*, 999 F.2d at 1115.

Second, the legislative history of ARPA refers repeatedly to public and Indian lands and makes no references whatsoever to private lands. *See, e.g.*, H.R. Rep. No. 96-311, 96th Cong., 1st Sess. 7 (1979) (purpose is "protection for archaeological resources on public lands and Indian lands); S. Rep. No. 96-179, 96th Cong., 1st Sess. 6 (1979) (purpose is to "provide greater protection . . . for archaeological resources on public lands and Indian lands"); 125 Cong. Rec. S10,832 (1979) (statement of Sen. Bumper) ("The purpose . . . is to provide greater protection . . . for archaeological resources located on public and Indian lands"); 125 Cong. Rec. S14,721 (1979) (statement of Sen. Bumper) ("this measure will protect archaeological resources located on public and Indian lands"). Congressman Udall, a chief sponsor of ARPA, stated that ARPA "prohibits the wanton destruction of archaeological sites and resources located on the *public domain or Indian lands*," and that ARPA "provides that recovered archaeological resources will remain the property of the United States." 125 Cong. Rec. 17,393-94 (1979) (emphasis added). Significantly, Congressman Udall added the following remarks: I want to emphasize in the boldest terms what the bill does not do: . . . It does not affect any lands other than the public lands of the United States and lands held

in trust by the United States for Indian tribes or individual Indian allottees." *Id.* These unambiguous expressions of Congressional intent provide compelling evidence that Congress had no intention of extending ARPA beyond public and Indian lands.

Finally, "[m]ost of the scholarly commentators on the Act assume that it is limited to federal and Indian lands." *Gerber*, 999 F.2d at 1115. Also, the Government had for some time—at least up until the commencement of this case—taken the view that ARPA did not apply to private lands. For example, the Department of Justice's sourcebook for prosecutions of ARPA cases states that ARPA violations require "that said resource was located on public and Indian lands. . . ." 2 *Archaeological Resources Protection: Federal Prosecution Sourcebook* at 1066 (Office of Professional Development and Training, Criminal Division, Department of Justice ed., 1992) (quoting Carol Carnett, United States Dep't of Interior, *Legal Background of Archaeological Resources Protection* 10 (United States Dep't of Interior Technical Brief No. 11) (1991)). In addition, the USDA Forest Service's only statement on the issue is that "[a] conviction under [ARPA] requires proof . . . [t]hat said resource was located on public lands. . . ." Southwestern Region, USDA Forest Service, *Cultural Resources Law Enforcement An Emerging Science* 101 (1980). Finally, the Department of the Interior's 1989 report to the Senate Committee on Energy and Natural Resources, in discussing the growing problem of archaeological looting, notes that "[s]ome of this destruction occurs on sites on private land and is not under the jurisdiction of the Federal government." U.S. Dept. of Interior, *Federal Archaeology: The Current Program* 31 (1989).

Therefore, there are strong indications that the court of appeals erred in its holding. The significance of that

holding on amici and their counterparts is plain and unmistakable: an erroneous decision unnecessarily subjects amici and their counterparts to ARPA. Amici therefore request that this Court grant certiorari so that court of appeals' important holding on this important, far-reaching issue of first impression can be reviewed expeditiously.

II. THE COURT OF APPEALS' HOLDING AS TO THE NECESSARY STATE LAW VIOLATION IS INCORRECT AND CONFUSING

The court of appeals' holding as to the type of law that triggers Section 470ee(c) is also incorrect and will lead to confusion as courts and amici try to interpret its meaning. Although Section 470ee(c) refers to the violation of "any" state or local law, ordinance, or permit, the court of appeals correctly determined that a literal application of "any" was improper and it placed a limiting construction on "any." *Gerber*, 999 F.2d at 1116. Under that limiting construction, the state or local law has to be "*related* to the protection of archaeological sites and objects." *Id.* (emphasis added). A more appropriate limiting construction, suggested by ARPA's legislative history, a USDA publication, and the design and object of ARPA is that the law must be a cultural resources protection law. For example, the USDA Forest Service states that "[s]ubsection (c) enlists Federal assistance in enforcing state and local antiquities laws. . . ." Robert B. Collins, *The Meaning Behind ARPA: How the Act is Meant to Work, in Cultural Resources Report No. 32* (Southwestern Region, USDA Forest Service ed., 1980) (emphasis added). Also, the only legislative history on subsection (c) is the statement of Senator Domenici, the Senate Sponsor of ARPA, that ARPA "would dovetail with existing state laws, such as New Mexico's, so that offenders could not

skip to another state to avoid prosecution." 125 Cong. Rec. S10,834 (1970). Senator Domenici clearly had state cultural resources protection laws in mind since New Mexico had recently enacted such a law at the time of his comments. N.M. Stat. Ann. §§ 18-6-3 to 18-6-22 (1993).

Amici's concern with the court of appeals' newly-formulated relatedness test is that it is really no test at all. The court of appeals offered no guidelines or standards for the application of the relatedness test. Courts will be confused in its application, and amici and their counterparts will be confused as to the ramifications of their actions. This is a particular concern because under Section 470ee(c) even civil laws and local ordinances can trigger ARPA's criminal and forfeiture provisions. 16 U.S.C. § 470ee(c). Consequently, a relatively minor transgression of civil law can snowball into a federal criminal offense and forfeiture of property. Although the court of appeals rejected a literal application "any" because it would have "carried the Act far beyond the objectives of its framers and created pitfalls for the unwary," amici believe that the court of appeals' limiting construction fails to overcome that concern. *Gerber*, 999 F.2d at 1116. Therefore, this Court should issue the writ so that the error and confusion stemming from the court of appeals' relatedness test can be promptly resolved.

CONCLUSION

The court of appeal's decision on these issues of first impression will have an far-reaching impact on amici, yet it is confusing and appears to be flawed. In order to correct those flaws and provide definitive guidance to the

federal courts and amici in future matters, amici respectfully urge this Court to issue the writ.

Respectfully submitted,

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No. 93-635 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR J. GERBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 470ee(c) of the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm, requires that the underlying state law violated be a law expressly addressed to the protection of archaeological resources.

2. Whether Section 470ee(c) of the Archaeological Resources Protection Act of 1979 applies to archaeological resources removed from private property without the owner's permission.

3. Whether Section 470ee(c) of the Archaeological Resources Protection Act of 1979 is unconstitutionally vague.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 999 F.2d 1112.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1993, and corrected on July 22, 1993. Pet. App. 1a-10a. The petition for a writ of certiorari was filed on October 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a conditional plea of guilty in the United States District Court for the Southern District of Indiana to five misdemeanor counts of interstate

transportation of archaeological resources, in violation of 16 U.S.C. 470ee(c) and (d). He was sentenced to 12 months' imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-9a.

1. In 1985, the General Electric Company (GE) purchased a piece of untillable land, which included a prominent knob on top of a ridge, next to its southwestern Indiana factory. Unbeknownst to anyone at the time, this knob was actually an ancient burial mound affiliated with the "Hopewell phenomenon." The "Hopewell phenomenon" represents an Indian culture that existed in the American midwest more than fifteen hundred years ago and that included the beginnings of settled agriculture, elaborate ceremonialism, and extensive and far-flung trading networks. Between 100 and 300 A.D., these Indians built a series of large earthen mounds over prepared mound floors that contained human remains and thousands of ceremonial artifacts and grave goods made of silver, copper, wood, cloth, leather, obsidian, flint, mica, quartz, pearl, shell, and drilled, carved, or inlaid human and bear teeth. The "GE Mound" in southwestern Indiana is one of the five largest Hopewell burial mounds known.[1] Until its discovery in May 1988, its contents—including two human skeletons, and perishable wood and leather artifacts—remained intact and well preserved. Pet. App. 2a-3a; Gov't C.A. Br. 4-6.

2. In 1987 and 1988, the Indiana Department of Highways oversaw the construction of a new road through the ridge near the GE Mound. The workmen were unable to

[1] The GE Mound was approximately 400 feet long, 175 feet wide, and 20 feet high. Construction of the mound required the Indians to haul an estimated 289,000 bushel basketloads of earth from the river to the ridge. Pet. App. 3a; Gov't C.A. Br. 4-5.

stabilize the roadbed, however, and thus in May 1988, they began to remove earth from the knob in order to stabilize the slopes and roadbed.[2] Two workmen scraping the earth soon discovered a large number of turtleback-shaped rocks packed together in the knob. They showed the rocks to Bill Way, a heavy-equipment operator on the project who had long collected Indian artifacts and recognized the significance of the rocks. Pet. App. 3a; Gov't C.A. Br. 6-9.

On June 3, 1988, Way used his bulldozer to fill in the pit left by the removal of earth and discovered hundreds of artifacts, including flint spearpoints, drilled and inlaid bear teeth, solid copper axeheads, and tooled leather. Way took the artifacts to his home in Illinois that night and returned for more artifacts the next day, after which he covered up the excavation site. Neither Way, his foreman, nor the other workmen notified the project engineer or anyone else about the archaeological discovery, as they were required to do. Pet. App. 3a; Gov't C.A. Br. 9-10.

In mid-July 1988, a fellow construction worker put Way in touch with petitioner, a well-known collector of Indian artifacts and promoter of annual Indian "relic-

[2] The workmen began the dirt "borrowing" operation only after the contractor had obtained an archaeological survey and clearance of the area, as required by federal and state highway regulations (the road was funded in part by the federal government). The survey did not locate any archaeological sites, but noted that if any archaeological materials were found during the "borrow" operation, the Indiana Division of Historic Preservation and Archaeology should be notified immediately. The Indiana Department of Highways manual, applicable to all state-administered highway contracts, also required contractors to bring in an archaeologist if artifacts were discovered during borrow operations. Gov't C.A. Br. 6-7; see Indiana Code § 8-23-9-52 (1992).

shows." Petitioner recognized Way's collection as Hopewell material, and he offered Way $6,000 for the artifacts. On July 21, 1988, petitioner met Way at Way's home in Illinois, where he paid Way $6,000 in cash for the artifacts and for revealing to petitioner the location of the GE Mound. That evening, Way took petitioner to the site in Indiana, where they encountered other people digging for artifacts. Petitioner returned to the mound site with two co-defendants four times over the next eight days, excavating and removing hundreds of artifacts, including copper axe-heads, silver earspools, and rare silver "panpipe" musical instruments. A GE security guard caught petitioner and ejected him from the site on his last visit. Pet. App. 3a; Gov't C.A. Br. 10-14.

Petitioner sold some of his artifacts at his annual "Indian Relic Show of Shows" in Owensboro, Kentucky, in early August 1988. In the spring of 1989, petitioner traveled to the Kentucky home of one of his co-defendants, where he paid $2,000 in cash for some of the artifacts the co-defendant had recovered from the GE Mound. Pet. App. 3a; Gov't C.A. Br. 14.

3. Petitioner was indicted on five misdemeanor counts and one felony count charging him with interstate transportation of archaeological resources, in violation of Sections 470ee(c) and (d) of the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm (ARPA),[3] and one count of conspiring to violate 16 U.S.C.

[3] Section 470ee(c) of Title 16 provides:

> No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

470ee(c) and (d), in violation of 18 U.S.C. 371. Petitioner moved to dismiss the indictment for failure to state an offense, arguing that the ARPA did not apply to his conduct and that the ARPA is void for vagueness. The district court denied the motion. See Pet. App. 13a-17a.

Several months later, petitioner entered a conditional guilty plea to five misdemeanor counts of violating the ARPA, reserving for appellate review the issues raised in his motion to dismiss. In return for his pleas, the government agreed to dismiss the two felony counts of the indictment. At his plea hearing, petitioner admitted that he had entered GE's land and removed Indian artifacts buried in the GE Mound without GE's permission. He also acknowledged that in so doing, he had committed criminal trespass and conversion in violation of Indiana law.[4] He further acknowledged that he had knowingly transported some of the stolen artifacts in interstate commerce. Pet. App. 3a; Gov't C.A. Br. 2-3.

4. The court of appeals affirmed petitioner's conviction, rejecting his claim that 16 U.S.C. 470ee(c) applies only to archaeological materials removed from federal

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Section 470ee(d) sets the penalties for violation of any of the other subsections of Section 470ee. Prior to November 3, 1988, a felony violation occurred when the commercial value of the archaeological resources was greater than $5,000; the 1988 amendments to the ARPA reduced that amount to $500. See Act of Nov. 3, 1988, Pub. L. No. 100-588, § 1(c), 102 Stat. 2983.

[4] Petitioner's ARPA violations were based upon violations of Indiana's criminal trespass and conversion laws. Under Indiana law, a person commits criminal trespass when he "[k]nowingly or intentionally interferes with the possession or use of the property of another person without the person's consent." Indiana Code § 35-43-2-2(4) (1992). A person who "knowingly or intentionally exerts unauthorized control over property of another person" commits criminal conversion. Indiana Code § 35-43-4-3 (1992).

and Indian lands, and not to those removed from private property. The court held that Section 470ee(c) is a "catch-all" provision designed to back up state and local laws protecting archaeological sites and objects wherever located, and that the interstate commerce requirement would be superfluous if that provision were limited to artifacts taken from federal or Indian lands. Pet. App. 5a-6a. The court also rejected petitioner's contention that the state or local law violated must be explicitly concerned with the protection of archaeological sites or objects. While the court agreed that the ARPA applies only to cases in which the state law violation is "related" to the protection of archaeological sites and objects, it held that such a law need not be limited to the protection of archaeological resources to be "related." Thus, the court found, violation of Indiana's laws forbidding trespass and conversion fell within the conduct prohibited by the ARPA. Pet. App. 7a-8a.

ARGUMENT

Although petitioner disputes the correctness of the court of appeals' decision, he does not contend that the ruling conflicts with the decision of any other state or federal court. To the contrary, petitioner characterizes the questions presented for this Court's review as "issues of first impression." Pet. 5. Given the absence of any split in authority, further review is not warranted.

1. Section 470ee(c) of Title 16 prohibits the sale, purchase, and transportation in interstate commerce of any archaeological resource that has been "excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law." Petitioner contends (Pet. 8-10) that Section 470ee(c) applies only to violations of state archaeological resources

protection laws. Nothing in the language of the statute supports such a restriction, and the court of appeals correctly rejected petitioner's argument. Petitioner relies upon the purported floor statement of Senator Domenici, the ARPA's Senate sponsor, see Pet. 9; but that statement offers no support for petitioner's proposed limitation. Senator Domenici merely caused to be printed in the Congressional Record a newspaper editorial which asserted that the ARPA "would dovetail with existing state laws" so that offenders could not avoid prosecution by fleeing to another State. 125 Cong. Rec. 21,241 (1979). That statement—even if it could properly be attributed to Senator Domenici—could provide no support for petitioner's claim that the language of Section 470ee(c) should be read as limited to violations of state archaeological protection laws.

In any event, it is the language Congress actually enacted, and not Congress's discussion of its intent, that defines the scope of the statute's coverage. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495-496 n.13 (1985) (what Congress thinks is "best determined by the statutory language that it chooses"); see also *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991) ("legislative purpose is expressed by the ordinary meaning of the words used"). Nor is there merit to petitioner's suggestion (Pet. 9) that the absence of affirmative references to state laws other than resource protection laws weighs against the court of appeals' interpretation. See *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history."); see

also *Sedima*, 473 U.S. at 495-496 n.13 ("congressional silence * * * cannot override the words of the statute").[5]

The court of appeals ruled that the state or local law violations must be "related" to the protection of archaeological resources in order to fall within the scope of Section 470ee(c). The court reasoned that a broader interpretation of the requisite state or local law violation—one that included *any* state or local law, regardless of subject—"would carry the Act far beyond the objectives of its framers and create pitfalls for the unwary." Pet. App. 8a. Petitioner argues (Pet. 8-10) that the court of appeals thereby established an unworkable standard. That contention provides no basis for this Court's review.

Indiana's laws forbidding trespass and conversion protect the owners of property from unauthorized intrusions, theft, and interference with their property. As the

[5] In support of his contention that the underlying state or local laws can only be antiquities laws, petitioner also cites (Pet. 9) a publication issued by the United States Department of Agriculture Forest Service. See Robert B. Collins, *The Meaning Behind ARPA: How the Act is Meant to Work* at 5, in Cultural Resources Report No. 32 (USDA Forest Service, Southwestern Region) (July 1980). That publication hardly provides unambiguous support for petitioner's position. Although it states that Section 470ee(c) "enlists Federal assistance in enforcing state and local antiquities laws" and "is designed to prevent one from violating a state antiquities law and fleeing across a state line," it does not directly address the question whether violations of other state and local laws may form the predicate for application of Section 470ee(c). In any event, an agency's interpretation of the law may be used only to clarify statutory ambiguities, see *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987); moreover, the Department of Agriculture is not the agency charged with implementation of the ARPA's criminal provisions. See *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment).

court of appeals noted, these laws thus clearly have objectives that "include but are not exhausted in the protection of Indian artifacts and other antiquities," and thus are "related" to the protection of archaeological resources.[6] Pet. App. 8a. Whatever the merits of the Seventh Circuit's approach as applied in other circumstances, the facts of petitioner's case do not support his contention that the court of appeals' standard is vague and unworkable. Nor do the facts suggest that the statute has functioned as a trap for the unwary: as the court of appeals noted, "there is no right to go upon another person's land, without his permission, to look for valuable objects buried in the land and take them if you find them." Pet. App. 6a.

2. Petitioner also renews his claim (Pet. 10-16) that Section 470ee(c) applies only to public and Indian lands, as defined in 16 U.S.C. 470bb(3) and (4), and not to private property. That claim is without merit.

The court of appeals properly found that Section 470ee(c) is a "catch-all" provision designed to back up state and local laws protecting archaeological sites and objects wherever located. Pet. App. 5a-6a. Unlike the other provisions of the ARPA, which expressly limit the archaeological resources protected to those located on or removed from public or Indian lands, Section 470ee(c) establishes federal jurisdiction over state offenses through the requirement that the transportation, sale, purchase, or receipt of the archaeological resources be in interstate or foreign commerce. As the court of appeals pointed out, the reference to interstate commerce would

[6] As the court of appeals pointed out, the reach of Indiana's criminal trespass and conversion laws may well have led the State at the time to assume that it needed no further explicit protection of archaeological resources. Pet. App. 8a-9a.

be "superfluous" if Section 470ee(c) were limited to artifacts taken from federal or Indian lands only, since the source alone would establish the requisite federal jurisdiction. Pet. App. 6a. Nothing in the language of the statute supports that limitation on the archaeological resources sought to be protected.

Petitioner contends (Pet. 11-16) that the omission of a reference to public and Indian lands in Section 470ee(c) was unintentional, and that the court of appeals erred in adopting its broad interpretation, because doubt as to whether the statute applies to private lands should be resolved in his favor. The language of Section 470ee(c), however, does not include any reference to public and Indian lands, and thus there is no room for doubt as to its coverage. See *United States* v. *Naftalin*, 441 U.S. 768, 773-774 (1979) (the "short answer is that Congress did not write the statute that way"). Where the statutory language is plain, the judicial inquiry is complete. *Freytag* v. *C.I.R.*, 111 S. Ct. 2631, 2636 (1991). The rule of lenity thus has no place in the consideration of the scope of Section 470ee(c), because that rule applies only when a statute is ambiguous.[7] See *Deal* v. *United States*, 113 S. Ct. 1993, 1998 (1993); *Bifulco* v. *United States*, 447 U.S.

[7] Petitioner also contends (Pet. 11-13) that the legislative history and congressional findings demonstrate congressional intent to limit the ARPA to public and Indian lands. As the court of appeals correctly noted, "[t]hat the statute, the scholarly commentary, and the legislative history are all focused on federal and Indian lands may simply reflect the fact that the vast majority of Indian sites * * * are located either in Indian reservations or on the vast federal public lands of the West." Pet. App. 5a. In any event, as discussed previously, the language that Congress enacted determines the scope of the statute. Although the prohibitions set forth in Sections 470ee(a) and 470ee(b) are expressly limited to public and Indian lands, Section 470ee(c) contains no such restriction.

381, 387 (1980) ("the 'touchstone' of the rule of lenity 'is statutory ambiguity' "). The court of appeals correctly found that Section 470ee(c) restricts the prohibited trafficking in archaeological resources only to trafficking in interstate or foreign commerce.[8]

3. Finally, petitioner claims (Pet. 16-17) that Section 470ee(c) is unconstitutionally vague. The court of appeals correctly rejected that argument. Petitioner cannot reasonably contend that he did not have sufficient notice that his invasion of private property was illegal. There also is no doubt that the clear language of Section 470ee(c) adequately informed him that transporting in interstate commerce the Indian artifacts he and his co-defendants knowingly took from GE's property was a violation of that statute. Cf. *United States* v. *Austin*, 902 F.2d 743 (9th Cir.) (rejecting vagueness challenge to 16 U.S.C. 470ee(a) because statute provides fair notice to defendant), cert. denied, 498 U.S. 874 (1990). Nor can petitioner prevail by asserting that the court of appeals' standard may prove vague as applied in other circumstances. The law as applied to petitioner is not vague,

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[8] Petitioner also argues that in 1980 "it was the official position of the USDA Forest Service * * * that ARPA did not extend to private property." Pet. 13 (citing *Cultural Resources Law Enforcement: An Emerging Science* (USDA Forest Service, Southwestern Region), at 1, 101 (1980)). Petitioner fails to note that a different Forest Service publication—also issued in 1980, and relied upon by petitioner for a different proposition—took a contrary view. See Collins, *supra*, at 5 ("one would be prohibitied [*sic*] in the new Act from traveling from Arizona to New Mexico to bulldoze a site on private land without a permit"). These publications may reveal initial uncertainty by the Forest Service regarding the scope of Section 470ee(c)'s application, but they do not establish an official departmental policy at odds with the holding of the court of appeals.

and he therefore cannot challenge the law's possible vagueness as applied to other defendants under other circumstances. See *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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